

**Bond University**

## **DOCTORAL THESIS**

### **Critical analysis of the law surrounding "one punch" killings**

Burgess, Craig

*Award date:*  
2016

[Link to publication](#)

#### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

---

# CRITICAL ANALYSIS OF THE LAW SURROUNDING ‘ONE PUNCH’ KILLINGS

---

AUGUST 1, 2016  
CRAIG NEILSON BURGESS



## **Abstract**

This thesis investigates the modern day tragedy of needless loss of life through so-called ‘one punch’ killings. Research has identified more than 90 deaths attributed to so-called ‘one punch’ assaults in Australia between 2000 and 2012. This thesis takes a critical examination of recent legislative moves in Australia and in some overseas jurisdictions that tighten the liability of offenders and the trend of concentrating on the *consequences* of the crime rather than looking towards the *criminality* of the offender. It also examines the efficacy of introducing new offences that abolish the test of foresight regarding the outcome of a fatal assault, in order to deal with the problem of mainly alcohol-fuelled violence. The thesis then considers whether there is a justifiable reason to amend the law and whether or not the range of existing offences which already carry high maxima, more fairly and justly labels the crime for the benefit of the offender, the victim and the community. While acknowledging the problem of random fatal violence needs to be addressed, the thesis argues penal populism such as tightening criminal liability and imposing longer sentences is not the answer. The preferred approach for this complex and multi-factorial problem is to concentrate on crime prevention through educational programs alerting young people to the dangers of personal violence as well as restricting alcohol trading hours in known trouble spots.



## **Declaration**

“This thesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy. This thesis represents my own original work towards this research degree and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made”.

Signed: .....

Date: ...../...../2016



## **Acknowledgements**

I thank Bond University Faculty of Law for a generous Dean's Scholarship throughout my Candidature.

Special thanks are due to my thesis supervisors, Professor Geraldine Mackenzie and the late Professor Ken Levy, who guided me with their infinite expertise and patience throughout my research journey.

I also acknowledge the support of Professors Eric Colvin & Michael Weir who advised and supported me during the early stages of my thesis. Thanks are also due to the professional and amenable administrative research staff at Bond Law School especially, Emma Petherick, Kim Weinert, Catherine Pini, Tonya Roberts as well as Shannon Murdoch. I am also indebted to my treasured colleague Dr Des Taylor for his efforts in acting as a sounding board and as a support in times of doubt.

I wish also to pay tribute to my dear, recently departed parents, Bruce & Miriam, who inspired me with their unconditional love and encouragement.

Finally, my long suffering family for standing by me during what seemed to them a never-ending quest which, at more times than I care to remember, deprived them of quality time with their husband and father. In particular, I wish to acknowledge my wife Anne not only for her love and support but her secretarial skills in proofing and formatting my numerous drafts.





# **TABLE OF CONTENTS**

TABLE OF CASES.....	xiii
TABLE OF STATUTES .....	xix
1 INTRODUCTION.....	1
1.1 ‘One-Punch’ killings: A modern day tragedy.....	1
1.2 The problems for criminal law with alcohol fuelled violence .....	4
1.3 Tightening the liability of ‘one punch’ killers .....	4
1.4 Fair Labelling.....	6
1.5 Correspondence Principle .....	8
1.6 Alternative charges .....	10
1.7 Community expectations .....	11
1.8 Chapter Outlines .....	13
1.8.1 Chapter 2– Unintentional and unforeseen acts.....	14
1.8.2 Chapter 3 – Justification/Excuse.....	14
1.8.3 Chapter 4– Luck & Fair Labelling.....	14
1.8.4 Chapter 5 – Community Expectations.....	14
1.8.5 Chapter 6 – Foreseeability, causation & consequences .....	15
1.8.6 Chapter 7 – Alternative Offences .....	15
1.8.7 Chapter 8 – A Normative Approach to unforeseeable events that result in death .....	15
1.8.8 Chapter 9 – Conclusion.....	16
2 UNINTENTIONAL AND UNFORESEEN ACTS.....	17
2.1 Criminal Culpability .....	17
2.2 Unforeseen events.....	22
2.3 History of s 23 in the Queensland Criminal Code 1899.....	26
2.4 Commentary on changes to s 23 Queensland Criminal Code.....	27
2.4.1 Comparison with United Kingdom and other jurisdictions .....	29
2.5 Meaning of ‘act’ and ‘event’ .....	30
2.6 Taking your victim as you find them.....	35
2.6.1 ‘Accident’ cases in disarray .....	36
2.7 Unforeseen events in other jurisdictions.....	39
2.8 Manslaughter under Australian Common Law.....	40
2.9 Manslaughter by criminal negligence .....	41
2.10 Manslaughter by an unlawful and dangerous act.....	42
2.11 Battery manslaughter.....	46

2.12	Is manslaughter the appropriate charge? .....	50
2.13	The lack of foreseeability excuse in practice .....	52
2.14	Queensland Department of Justice and Attorney-General audit on Defences to Homicide: Accident and Provocation.....	53
2.14.1	<i>Use of ‘accident’ in murder trials in Queensland</i> .....	54
2.14.2	<i>Use of ‘accident’ in Queensland manslaughter trials</i> .....	54
2.15	The ‘One-Punch’ Killer in Other Jurisdictions .....	55
2.15.1	<i>Canada</i> .....	55
2.15.2	<i>Germany</i> .....	57
a)	Differences in approach between German & English criminal law .....	58
b)	Law Commissions consider German approach .....	59
2.15.3	<i>Commonwealth of Australia</i> .....	60
2.16	Alternative charges to manslaughter .....	62
2.17	Conclusion.....	64
3	JUSTIFICATION/EXCUSE .....	67
3.1	Introduction to the theory of excuse in criminal law .....	67
3.2	The Defence of Insanity.....	68
3.3	Utilitarian theories .....	72
3.4	Choice theory .....	73
3.5	Character theory.....	75
3.6	Recent Theories of Excuse.....	78
3.7	Distinguishing Justification from Excuse .....	80
3.8	Justifiable and Excusable Homicide .....	82
3.9	Special verdicts for excusing defences? .....	85
3.10	Excuse relating to death caused by ‘one punch’ .....	85
3.11	Can violence ever be excused?.....	87
3.12	Intoxication as an excuse.....	89
3.13	Self-induced intoxication .....	91
3.14	Intoxication and s 23(1A) of the Queensland Criminal Code .....	92
3.15	Intoxication.....	94
3.16	Sentencing .....	95
3.17	The culpability of consensual fights.....	96
3.18	Conclusion.....	99
4	LUCK & FAIR LABELLING.....	101
4.1	Introduction.....	101
4.2	The Definition of Luck .....	102
4.3	Moral Luck .....	103

4.4	Outcome responsibility .....	106
4.5	The Role of Luck in the Criminal law .....	108
4.6	Deterrence/Crime prevention.....	112
4.7	Just Punishment .....	115
4.8	The Assumption of Risk .....	117
4.9	The Correspondence Principle.....	118
4.10	Fair Labelling .....	120
4.11	The Principle of Fair Labelling .....	122
4.12	Too Much Discretion for Judges? .....	124
4.13	Fairness to the Victim .....	127
4.14	Proportionality.....	129
4.15	Conclusion.....	132
5	COMMUNITY EXPECTATIONS .....	135
5.1	Introduction.....	135
5.2	Sentencing and Public Opinion.....	136
5.3	Public Depictions of Violence .....	139
5.4	Public Opinion Survey.....	141
5.5	Public Perceptions of Crime .....	143
5.6	A ‘Fearful Society’ .....	147
5.7	Juries .....	149
5.8	Jury Comprehension Problems .....	154
5.9	Conclusion .....	156
6	FORESEEABILITY, CAUSATION & CONSEQUENCES .....	159
6.1	Introduction.....	159
6.2	Foreseeability.....	160
6.3	Foresight of the Probability of Death .....	164
6.4	A Probable Consequence .....	167
6.5	Pure Causation Test ‘not appropriate’ .....	168
6.6	‘Ordinary’ and ‘Reasonable’ Person.....	172
6.7	Objective Test Criticism .....	175
6.8	Reasonable Test in Other Jurisdictions.....	178
6.9	Conclusion .....	179
7	CAUSATION .....	181
7.1	Introduction.....	181
7.2	Causation tests .....	181
7.3	The Substantial Cause Test.....	183
7.4	The Natural Consequence Test .....	185

7.5	Intervening Acts.....	186
7.6	Reasonable Foreseeability .....	188
7.7	Conclusion .....	190
8	ALTERNATIVE OFFENCES .....	193
8.1	Introduction.....	193
8.2	Unlawful Assault Causing Death.....	195
8.2.1	<i>Western Australia - Unlawful assault causing death</i> .....	201
	<i>Minimum penalty – imprisonment for 10 years</i> .....	201
a)	Reinforcement of community expectations.....	202
b)	Human Rights concerns over sentencing .....	203
c)	Private Member’s Bill calls for increased penalties .....	205
8.2.2	<i>Northern Territory – Violent act causing death</i> .....	207
a)	General objective of the legislation.....	208
b)	Main provisions of the legislation .....	208
8.2.3	<i>New South Wales - Assault causing death</i> .....	210
a)	Criticism of new legislation .....	213
b)	No public consultation process.....	214
8.2.4	<i>Queensland - Unlawful Striking causing death</i> .....	215
a)	The excuse of accident abolished.....	216
b)	Charging decisions .....	217
c)	New law sees changes to Penalties & Sentences Act.....	218
d)	Lack of consultation .....	219
8.2.5	<i>Victoria - Coward’s Punch Manslaughter</i> .....	220
a)	Removal of judge’s discretion?.....	221
b)	Mandatory sentences attract criticism .....	222
8.2.6	<i>A Lack of Comity in Australian States/Territories</i> .....	223
8.2.7	<i>Ireland - Assault causing death</i> .....	224
a)	Assault causing death definition.....	225
b)	Draft Homicide Bill.....	226
8.3	Duty of Persons in Charge of Dangerous Things .....	227
8.4	Killing by Gross Carelessness .....	231
8.5	Gross Negligence Manslaughter .....	234
8.6	The Abolition of the Excuse of a Lack of Foreseeability .....	236
8.7	Statutory Alternatives .....	236
8.8	Abolish Foreseeability Altogether? .....	238
8.9	Conclusion .....	240

9	A NORMATIVE APPROACH TO THE EXCUSE OF ‘ACCIDENT’ .....	243
9.1	Introduction.....	243
9.2	Limits of Criminal Law .....	244
9.2.1	<i>The dangers of changing the law</i> .....	245
9.2.2	<i>Education rather than law change</i> .....	246
9.2.3	<i>Reform of alcohol laws suggested to change violent culture</i> .....	248
9.2.4	<i>‘Hard cases’ make bad law</i> .....	249
9.2.5	<i>Intention or consequence; which should prevail? The UK experience..</i>	250
a)	More appropriate charges.....	251
b)	A change in emphasis.....	255
c)	Consistency of sentencing .....	255
d)	Guideline Judgments .....	257
e)	A landmark judgment.....	258
f)	Low culpability and consequent death .....	261
g)	Dangerous driving and its consequences.....	262
9.2.6	<i>Fairness in labelling</i> .....	264
9.3	Sentencing and punishment .....	265
9.4	Constructive Manslaughter .....	278
9.4.1	<i>History</i> .....	278
9.4.2	<i>Modern cases</i> .....	281
9.4.3	<i>Law Commission reports</i> .....	282
9.4.4	<i>United States experience</i> .....	283
9.4.5	<i>Empirical studies involving involuntary manslaughter</i> .....	285
9.4.6	<i>Labelling of fatal assaults</i> .....	286
9.5	Over Criminalisation.....	287
9.5.1	<i>Prison populations</i> .....	288
9.5.2	<i>Shift in sentencing policy</i> .....	290
9.6	Conclusion .....	290
10	CONCLUSION .....	293
10.1	Unforeseen Events.....	294
10.2	Outcome Luck .....	295
10.3	Correspondence and Proportionality .....	296
10.4	Fair Labelling .....	297
10.5	Foreseeability .....	298
10.6	The Effect of Prosecuting Decisions .....	301
10.7	Consequences v Criminality.....	303
10.8	Addressing Social Influences More Effectively.....	305

10.9	Closing a Gap in the Law .....	305
	Bibliography .....	309

## **TABLE OF CASES**

### **Cases**

<i>Alabaster</i> [1912] 47 L.J. Newsp.397.....	279
<i>Andrews v DPP</i> [1937] AC 576 .....	41, 44
<i>Arulthilakan v The Queen</i> [2003] 78 ALJR 257 .....	183
<i>Attorney-General for the State of Queensland v Hynds &amp; Anor (No 3)</i> [2012] QSC 318 .....	135
<i>Ball</i> [1989] Crim LR 730. ....	280
<i>Barca v The Queen</i> (1975) 133 CLR 82.....	164
<i>Barot</i> [2007] EWCA 1119.....	259
<i>Bedder v DPP [1954] 1 WLR 1119</i> .....	173
<i>Bibi</i> [1987] Cr App R 360. ....	256
<i>Billam</i> [1986] Cr App R 347. ....	256
<i>Bouhey v The Queen</i> (1986) 161 CLR 10 .....	166
<i>Brewster</i> [1998] 1 Cr App R 220 .....	256
<i>Brown v The King</i> (1913) 17 CLR 570 .....	124
<i>Burns v Currell</i> [1963] 2 QB 433 .....	112
<i>Burns v The Queen</i> (2012) 246 CLR 334.....	42
<i>Callaghan v The Queen</i> (1952) 87 CLR 115.....	227, 228
<i>Cameron</i> (1990) 47 A Crim R 397 .....	95
<i>Cook v Cook</i> [1987] 61 ALJR 25 .....	175
<i>Coomer</i> (1989) 40 A Crim R 417 .....	43
<i>Coutts</i> [2006] UKHL 39 .....	193
<i>Cranssen v The King</i> (1936) 55 CLR 509 .....	303
<i>Cutter v The Queen</i> [1997] 71 ALJR 638.....	90, 172
<i>Dabelstein</i> [1966] Qd R 411.....	227
<i>Darkan v The Queen</i> (2006) 227 CLR 373 .....	167
<i>Dawson</i> [1985] 81 Cr App R 150.....	280
<i>DPP v Newbury</i> [1977] AC 500 .....	30
<i>DPP v Smith</i> [1961] AC 290 .....	171
<i>Duffy v The Queen</i> [1981] WAR 72 .....	33, 90
<i>Emery</i> (1978) 18 A Crim R 49 .....	71
<i>Evgeniou v The Queen</i> [1965] ALR 209 .....	228
<i>G</i> (2003) UKHL 50, (2004) 1 AC 1034 .....	119
<i>Giorgianni v The Queen</i> (1985) 156 CLR 47.....	47
<i>Gray v Motor Accident Commission</i> (1998) 196 CLR 1 .....	23
<i>Griffiths v The Queen</i> [1994] 69 ALJR 77 .....	39, 229
<i>He Kaw Teh v The Queen</i> (1985) 157 CLR 523.....	86
<i>Holmes</i> [1993] 2 Tas R 232.....	196
<i>Hughes</i> [1988] 10 Cr App R (S) 169.....	253, 254
<i>Hughes and Lord Advocate</i> [1963] AC 837 .....	162
<i>Hussain</i> [2004] 2 Cr App R (S) 497 .....	125
<i>Hyam</i> [1975] AC 55 .....	163
<i>I v DPP</i> [2002] 1 AC 285 .....	51
<i>Imbree v McNeilly; McNeilly v Imbree</i> [2008] 82 ALJR 1374.....	175
<i>Inge v The Queen</i> (1999) 199 CLR 295 .....	5
<i>Jackson &amp; Hodgetts</i> (1989) 44 A Crim R 320 .....	229
<i>Kalit</i> [1971-72] P&NGLR 124.....	228



<i>Kamipeli</i> [1975] 2 NZLR 610 (CA) .....	89
<i>Kaporonovski v The Queen</i> (1973) 133 CLR 209 .....	27, 32, 33, 165
<i>Kaporonovski v The Queen</i> (1973) HCA 35 .....	77
<i>Kissier</i> (1982) 7 A Crim R 171 .....	28, 238
<i>Kusu</i> (1980) 4 A Crim R 72 .....	91
<i>La Fontaine v The Queen</i> (1976) 136 CLR 62 .....	170
<i>Laws v State</i> [1988] 26 Texas Crim. 643, 10 SW 220 .....	81
<i>Lee</i> [2012] EWCA Crim 835 .....	261
<i>Lergesner v Carroll</i> [1991] 1 Qd R 206 .....	196
<i>Lewis v Daily Telegraph Ltd</i> [1964] AC 234 .....	173
<i>Lipman</i> [1969] 3 WLR 819 .....	281
<i>MacKenzie</i> (1996) 190 CLR 348 .....	155
<i>Mamote-Kulang of Tamagot v The Queen</i> (1964) 111 CLR 62 .....	36, 47
<i>McAuliffe v The Queen</i> (1995) 183 CLR 108 .....	183
<i>McCallum</i> [1969] Tas SR 73 .....	228
<i>McNamara</i> [1984] 6 Cr App R (S) 356 .....	236
<i>MFA v The Queen</i> (2002) 213 CLR 606 .....	155
<i>Moffa</i> (1977) 138 CLR 601 .....	172, 175
<i>Moloney</i> [1985] 1 All ER 1025 .....	170
<i>Mowatt</i> [1968] 1 QB 421 .....	281
<i>Murray v The Queen</i> (2002) 211 CLR 193 .....	32, 160
<i>Murray v The Queen</i> (2002) HCA 26 .....	31, 32
<i>National &amp; General Insurance Co Ltd v Chick</i> [1984] 2 NSWLR .....	24
<i>Nettleship v Weston</i> [1971] 2 QB 691 .....	175
<i>O'Brien</i> [1981] WAR 305 .....	60
<i>O'Connor</i> (1980) 146 CLR 64 .....	89
<i>O'Neill</i> [1967] 51 Crim LR 241 .....	249, 253
<i>Olsen v Grain Sorghum Marketing Board: Ex parte Olsen</i> [1962] Qd R 580 .....	69
<i>Osland v The Queen</i> (1998) 197 CLR 316 .....	160
<i>Packett v The King</i> (1937) HCA 53 .....	124
<i>Parker v The Queen</i> (1963) 111 CLR 610 .....	172
<i>Pemble v The Queen</i> (1971) 124 CLR 107 .....	170
<i>People of the State of California v Orental James Simpson</i> [1995] Case No. #BA097211, Los Angeles Superior Court .....	19
<i>People v Causey</i> [2003] 793 NE 2d 169 .....	164
<i>People v Washington</i> [1965] 62 Cal 2d 777 .....	129
<i>Pettipher</i> [1989] 11 Cr App R (S) 321 .....	226
<i>Phillips</i> [1985] 7 Cr App R (S) 235 .....	255
<i>Plomp v The Queen</i> (1963) 110 CLR 234 .....	164
<i>R v Amituanai</i> (1995) 78 A Crim R 588 .....	86
<i>R v Appleby &amp; Ors</i> [2009] EWCA Crim 2693 .....	11, 258, 259, 292
<i>R v Besim</i> (2004) 148 A Crim R 28 .....	30
<i>R v Bibi</i> [1980] 1 WLR 1193 .....	288
<i>R v Blackledge</i> (NSWCCA, Unreported, 12 December 1995) .....	124, 292
<i>R v Bruce</i> CCC [1847] 2 Cox .....	30
<i>R v Callaghan</i> [1942] St R Qd 40 .....	29, 46, 87
<i>R v Camplin</i> [1978] 2 All ER 168 .....	173, 174
<i>R v Carey</i> [2006] EWCA Crim 17 .....	280
<i>R v Cato</i> [1976] 1 All ER 260 .....	183
<i>R v Church</i> [1966] 1 QB 59 .....	41, 44, 281

<i>R v Church</i> [2010] EWCA Crim 351 .....	261
<i>R v Coleman</i> [1992] Crim LR 315 .....	254
<i>R v Condon</i> [2010] QCA 117 .....	32
<i>R v Corbett</i> [1903] St R Qd 246 .....	92
<i>R v Coutts</i> [2006] 1 WLR 2154 .....	192, 198
<i>R v Cowles and Cowles</i> (4)(5) (2009) EWCA Crim 2693 .....	64
<i>R v Cowles and Cowles</i> (4)(5) (2009) EWCA Crim 2693 at para. 20.....	261
<i>R v Crabbe</i> (1985) 156 CLR 464 .....	171
<i>R v Creamer</i> [1966] 1 QB 72 .....	47, 57
<i>R v Creighton</i> [1993] 3 SCR 3.....	56
<i>R v Darrington and McGauley</i> [1980] VR 353.....	71
<i>R v Dawson</i> [1978] VR 536.....	71
<i>R v DeSousa</i> [1992] 2 SCR 944.....	57
<i>R v Donovan</i> [1934] 2 KB 498 .....	197
<i>R v Dulu Miah</i> [2005] EWCA Crim 1798.....	258
<i>R v Ellem [No 2]</i> [1995] 2 Qd R 549.....	162
<i>R v Fairbanks</i> [1986] 1 WLR 1202 .....	192
<i>R v Fernando</i> [1992] 76 A Crim R 58.....	218
<i>R v Fitzgerald</i> [1999] QCA 109 .....	32
<i>R v Fleeting (No 1)</i> [1977] NZLR 1 .....	188
<i>R v Forbes</i> (2005) 160 A Crim R 1 .....	124
<i>R v Foster &amp; Ors</i> [2007] EWCA Crim 2869.....	194, 198
<i>R v Frost; Ex-parte A-G</i> [2004] 149 A Crim R 151 .....	269, 270, 301
<i>R v Furby</i> [2005] EWCA Crim 3147 .....	255, 260
<i>R v G &amp; Anor</i> [2003] UKHL 50 .....	9
<i>R v Gallagher</i> [2007] NSWCCA 296.....	302
<i>R v Goodchild</i> (unreported, August 12 1991 .....	255
<i>R v Hallett</i> [1969] SASR 141 .....	160, 182
<i>R v Hayward</i> [1908] 21 Cox 692.....	280
<i>R v Hind</i> (1995) 80 A Crim R.....	161
<i>R v Hodgetts and Jackson</i> [1990] 1 Qd R 456 .....	228
<i>R v Holzer</i> [1968] VR 481 .....	42
<i>R v Hung</i> [2012] QCA 341 .....	92, 250, 303
<i>R v Hung</i> [2012] QSC 158.....	167
<i>R v Hurley</i> [1967] VR 526.....	70
<i>R v Hyam</i> [1975] AC 55 .....	170
<i>R v JM and SM</i> [2012] EWCA Crim 2293.....	45
<i>R v Jobidon</i> [1988] 45 CCC (3 <sup>rd</sup> ) 176 .....	97, 197
<i>R v Joinbee</i> [2013] QCA 246 .....	29
<i>R v Keenan</i> (2009) 236 CLR 397 .....	10
<i>R v Kirkman</i> [1987] 44 SASR 591 .....	54
<i>R v Knutsen</i> [1963] Qd R 157.....	187
<i>R v Kusu</i> [1981] Qd R 136 .....	95
<i>R v Lamb</i> [1967] 2 QB 981.....	41
<i>R v Lavender</i> (2005) 222 CLR 67 .....	8
<i>R v Lawrence</i> [1980] 1 NSWLR 122 .....	71
<i>R v Little</i> [2006] QSC (unreported) .....	1
<i>R v Little</i> [2007] QSC (unreported) .....	92
<i>R v Loveridge</i> [2013] NSWSC 1638 .....	300
<i>R v Loveridge</i> [2014] NSWCCA 120.....	256, 273, 302

<i>R v Major</i> [2013] QCA 114 .....	251
<i>R v Mallet</i> [1971] 14 JP Supp 1 .....	69
<i>R v Mallet</i> [1972] Crim LR 260 .....	105, 125, 143, 249, 292
<i>R v Martyn</i> [2011] NTSC .....	208
<i>R v Martyr</i> [1962] Qd R 398 .....	29, 35, 185
<i>R v MBX</i> [2013] QCA 214.....	9
<i>R v McCallum</i> [1969] TAS SR 73 .....	43
<i>R v Mead</i> [2010] QCA 370.....	9
<i>R v Mills</i> [1998] 4 VR 235 .....	303
<i>R v Minor</i> [1992] 2 NTLR 183.....	24, 50
<i>R v Mitchell</i> .....	302
<i>R v Morgan</i> [1975] UKHL 3; (1976) AC 182 .....	86
<i>R v Mullen</i> [1938] St R Qd 97 .....	34
<i>R v Newbury</i> [1977] AC 500 .....	44
<i>R v Nydam</i> [1977] VR 430 .....	41
<i>R v Offen (No 2)</i> [2001] 1 Cr App R 372 .....	130
<i>R v Pagett</i> [1983] 76 Cr App R 279 .....	160
<i>R v Pakazoff</i> [1986] 43 SASR 99 .....	71
<i>R v Paul Anthony Van Den Bemd</i> [1992] QCA 236.....	36
<i>R v Puckeridge</i> [1999] 74 ALJR 373.....	189
<i>R v Rau</i> [1972] Tas SR 59 .....	47
<i>R v Sandby</i> [1993] 117 FLR 218 .....	152
<i>R v Scarth</i> [1945] St R Qd 38.....	227
<i>R v Seminara</i> [2002] QCA 131.....	176
<i>R v Sharp</i> [1987] QB 853 .....	75, 76
<i>R v Smith</i> [1959] 2 QB 35.....	182, 185
<i>R v Smithers</i> [1978] 1 SCR 506.....	183, 217
<i>R v Steindl</i> [2002] 2 Qd R 542.....	93
<i>R v Stuart</i> (1974) 134 CLR 426 .....	17
<i>R v Taiters</i> [1997] 1 Qd R 333 .....	29, 31
<i>R v Tupou; ex parte A-G (Qld)</i> [2005] QCA 179 .....	86
<i>R v Van Den Bemd</i> (1994) 179 CLR 137 .....	27, 35, 161
<i>R v Van Den Bemd</i> [1995] 1 Qd R 401.....	36, 165
<i>R v Wardle</i> [2011] QCA 339.....	28
<i>R v Watson</i> [1989] EWCA Court of Appeal (Criminal Division).....	280
<i>R v Willersdorf</i> [2001] QCA 183.....	9
<i>R v Wills</i> [1983] VR 201 .....	43
<i>R v Wooler</i> [1971] QWN 10.....	269, 301
<i>R v Young</i> [1969] Qd R 417 .....	27, 228, 229
<i>Re Attorney-General's Reference (No 6 of 1980)</i> [1981] 1 QB 715 .....	96, 196
<i>Rogers and Murray</i> (1989) 44 A Crim 301 .....	92
<i>Royall v The Queen</i> (1991) 172 CLR 378 .....	160
<i>Royall v The Queen</i> [1991] 65 ALJR 451 .....	183, 184
<i>Ryan v The Queen</i> (1967) 121 CLR 205 .....	92, 95
<i>Saviane v Stauffer Chemical Co (Australia) Pty Ltd</i> [1974] 1 NSWLR .....	24
<i>Snow</i> [1962] Tas SR 271 .....	90
<i>Southern Portland Cement Ltd v Cooper</i> [1974] AC 623 .....	163
<i>Stapleton v The Queen</i> (1952) 86 CLR 358 .....	34
<i>State of Maine v Robert Pray</i> [1977] 378 A 2d 1322.....	43, 282, 284
<i>State v Budge</i> [1927] 126 Me 223, 137 A 244 .....	284

<i>State v Frazier</i> [1936] 98 SW 2d 707 Mo .....	38
<i>Stevens v The Queen</i> (2005) HCA 65 .....	23, 163
<i>Stevens v The Queen</i> [2005] 80 ALJR 91 .....	194
<i>Taiters</i> [1997] 1 Qd R 333.....	298
<i>Timbu-Kolian v The Queen</i> (1968) 119 CLR 47 .....	33, 47, 48, 50, 87, 228
<i>Tominey</i> [1986] 8 Cr App R (S) 161 .....	236
<i>Upton</i> [1980] 71 Cr App R 102 .....	256
<i>Vallance v The Queen</i> (1961) 108 CLR 56 .....	31, 33
<i>Vallance v The Queen</i> (1961) HCA 42.....	23, 27
<i>Van Den Bemd</i> [1995] 1 Qd R 401 .....	34
<i>Vaughan v Menlove</i> [1837] 3 Bing NC 468; 132 ER 490 .....	175
<i>Veen v The Queen</i> (1979) 143 CLR 458 .....	296
<i>Veen v The Queen [No 1]</i> (1979) 143 CLR 458.....	129
<i>Veen v The Queen [No 2]</i> (1988) 164 CLR 465.....	129, 296
<i>Viro</i> (1978) 141 CLR 88.....	89
<i>Walker</i> [1992] 13 Cr App R (S) 474 .....	279
<i>Watson</i> [1989] 1 WLR 684.....	232
<i>Western Australia v Jones</i> [2011] WASC 136 .....	203
<i>Western Australia v JWRL (No 4)</i> [2009] WASC 392.....	9, 63
<i>Western Australia v JWRL</i> [2010] WASC 179 .....	63
<i>Western Australia v JWRL</i> [2010] WASC 392 .....	203
<i>Western Australia v Lillias</i> [2012] WASC 100 .....	132, 205
<i>Wicks</i> [1989] 3 WAR 372.....	92
<i>Wilson v The Queen</i> (1992) 174 CLR 313 .....	42, 46, 56, 88, 173
<i>Woolmington v DPP</i> [1935] AC 462.....	40
<i>Zikovic</i> (1985) 17 A Crim R 396.....	43



## **TABLE OF STATUTES**

### **Statutes**

<i>Amendment of Crimes Act (No 40) 1900 (NSW)</i> .....	210
<i>American Model Penal Code 1962 210.3</i> .....	178
<i>Californian Penal Code 1872 s 189</i> .....	129
<i>Civil Liability Act 1936 (SA) s 31</i> .....	166
<i>Civil Liability Act 2002 (NSW) s 5B</i> .....	166
<i>Civil Liability Act 2003 (Qld) s 9</i> .....	166
<i>Code Civil [Civil Code] (France)</i> .....	178
<i>Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A</i> .....	264
<i>Crimes Act 1900 (NSW)</i> .....	49
<i>Crimes Act 1900 (NSW) s 25A</i> .....	4, 62, 222, 304
<i>Crimes Act 1900 (NSW) s 418</i> .....	294
<i>Crimes Act 1900 (NSW) s 93C</i> .....	51
<i>Crimes Act 1914 (Cth) s 16A</i> .....	264
<i>Crimes Act 1958 (Vic)</i> .....	4
<i>Crimes Amendment (Gross Violence Offences) Bill 2012 (Vic)</i> .....	220
<i>Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 (NSW)</i> .....	212
<i>Crimes Sentencing Act 2005 (ACT) s 33</i> .....	264
<i>Criminal Code (ACT), s 42</i> .....	294
<i>Criminal Code (Assault Causing Death) Amendment Bill 2007(Qld)</i> .....	60
<i>Criminal Code (Violent Act Causing Death) Amendment 2012 (NT)</i> .....	207
<i>Criminal Code 1899 (Qld) s 2</i> .....	17
<i>Criminal Code 1899 (Qld) s 23 (1)(b)</i> .....	2
<i>Criminal Code 1899 (Qld) s 245</i> .....	196
<i>Criminal Code 1899 (Qld) s 271</i> .....	294
<i>Criminal Code 1899 (Qld) s 300</i> .....	214
<i>Criminal Code 1899 (Qld) s 328A</i> .....	48
<i>Criminal Code 1899 (Qld) s 339</i> .....	235
<i>Criminal Code 1899 (Qld) s 36</i> .....	29
<i>Criminal Code 1899 (Qld) s 72</i> .....	51
<i>Criminal Code 1913 (WA) s 71</i> .....	51
<i>Criminal Code 1924 (Tas) s 13</i> .....	40, 294, 295
<i>Criminal Code 1924 (Tas) s 156</i> .....	49
<i>Criminal Code 1924 (Tas) s 80</i> .....	51
<i>Criminal Code 1983 (NT) s 159</i> .....	49
<i>Criminal Code 1983 (NT) s 161A</i> .....	4, 62, 222
<i>Criminal Code 1983 (NT) s 26</i> .....	50
<i>Criminal Code 1983 (NT) s 29</i> .....	294
<i>Criminal Code 1983 (NT) s 31</i> .....	40, 294, 295
<i>Criminal Code 1983 (NT) s 69</i> .....	51
<i>Criminal Code 1985 (Can) s 229</i> .....	56
<i>Criminal Code 1985 (Can) ss 143, 145, 149</i> .....	128
<i>Criminal Code 1985 (Can) ss 271-273</i> .....	128
<i>Criminal Code 1985 (Can) ss 718-718.2</i> .....	264
<i>Criminal Code 1995 (Cth) s 10.4</i> .....	294

<i>Criminal Code 1995 (Cth) s 115.1</i> .....	60
<i>Criminal Code 1995 (Cth) s 115.2</i> .....	60
<i>Criminal Code 1995 (Cth) s.115.2</i> .....	60
<i>Criminal Code Act 1899 (Qld) s 266B</i> .....	37
<i>Criminal Code and Other Legislation Amendment Bill 2010 (Qld)</i> .....	29, 34
<i>Criminal Law (Sentencing) Act 1988 (SA) s 10</i> .....	264
<i>Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12</i> .....	49, 131
<i>Criminal Law Amendment Act 1997 (Qld) s 10</i> .....	37
<i>Criminal Procedure Regulation 2010 (NSW)</i> .....	212
<i>Dangerous Prisoner (Sexual Offenders) Act 2003 (Qld)</i> .....	121
<i>German Criminal Code (1998) s 212</i> .....	57
<i>Jury Act 1995 (Qld) s 70</i> .....	2
<i>Liquor Amendment Bill 2014 (NSW)</i> .....	4
<i>Penalties and Sentences Act 1992 (Qld) s 161A</i> .....	251, 300
<i>Penalties and Sentences Act 1992 (Qld) s 9</i> .....	121
<i>Road Traffic Act 1930 (UK)</i> .....	44
<i>Road Traffic Act 1978 (UK)</i> .....	261
<i>Safe Night Out Legislation Amendment Bill 2014 (Qld)</i> .....	215, 216, 217, 353
<i>Sentencing Act 1991 (Vic) s 5</i> .....	264
<i>Sentencing Act 1995 (WA) ss 6-8</i> .....	264
<i>Sentencing Act 1999 (NT) s 5</i> .....	264
<i>Sentencing Act 2002 (NZ) ss 8 &amp; 9</i> .....	264
<i>Stratfgessetzbuch [Criminal Code] (Germany) [StGB]</i> .....	178
<i>Summary Offences Act 1979 (NT) s 47AA</i> .....	51
<i>Victims Compensation Act 1996 (NSW)</i> .....	19
<i>Victims of Crime Assistance Act 1996 (Vic)</i> .....	19
<i>Victims of Crime Assistance Act 2009 (Qld)</i> .....	19
<i>Wrongs Act 1958 (Vic) s 48</i> .....	166
<i>Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012 (Qld)</i> ...	216

# 1 INTRODUCTION<sup>1</sup>

## 1.1 ‘One-Punch’ killings: A modern day tragedy

On the 4<sup>th</sup> December 2005, an intoxicated young man, Jonathon James Little, 21, was walking in the Brisbane Valley Mall in the early hours of a Sunday morning, arguing with his girlfriend on his mobile phone.<sup>2</sup> Another even more intoxicated young man David Stevens approached Little and said something to him. Eyewitness accounts of the incident vary; one witness said that Little and Stevens began pushing each other, another said that Stevens confronted Little, was ‘in his face’, and blocked his path. What is known is that Little punched Stevens once, knocking him to the ground. When down, Little then kicked Stevens in the back of the head. Stevens was taken to hospital and put on life support until he died two or three days later from a subarachnoid haemorrhage that occurred as a consequence of a traumatic rupture of the left vertebral artery.<sup>3</sup>

The post-mortem examination revealed that the deceased had a very high blood alcohol concentration, and medical evidence showed that it was more likely that the fatal blow was the punch, rather than the kick, and that the punch was thrown with moderate force, causing only a bruise.<sup>4</sup>

---

<sup>1</sup> Although this thesis draws from a wide range of jurisdictions the reader will note a Queensland bias. This is because the genesis of the thesis first arose from the Queensland Law Reform Commission, ‘A Review of the Excuse of Accident and the Defence of Provocation’, (Report No 64, 2008). There is also a concentration on the Code States because it is in those jurisdictions that most of the recent changes to the law concerning fatal assaults have occurred.

<sup>2</sup> *R v Little* [2006] QSC (unreported). The facts of this matter are taken from the Queensland Law Reform Commission, above n 1, 95.

<sup>3</sup> A subarachnoid haemorrhage is a bleed usually associated with aneurysms or other weakened blood vessels of the brain. Causes include trauma such as a blow to the head and because alcohol causes blood vessels to dilate and reduce muscle tone. A blow to the head of an intoxicated person can cause hyperextension of the head or neck, or a twisting of the head or neck, and this in turn generates greater stretching forces on the vertebral arteries, which can rupture and cause death. See, Victorian Government, *Health Information & News* (20 May 2014), [www.betterhealthchannel.vic.gov.au](http://www.betterhealthchannel.vic.gov.au)

<sup>4</sup> The deceased’s blood alcohol concentration was 0.277 per cent. The pathologist called by the prosecution at trial gave evidence that this level of intoxication contributed to death: the rupture injury is associated with heavy intoxication.



Little was subsequently indicted for Steven's murder. At trial, the defence argued that the prosecution had not proved beyond reasonable doubt that Little intended to kill Stevens or cause him grievous bodily harm and, in the alternative, for manslaughter, the defence argued that the prosecution could not negate or overcome the excuse of 'accident': that an ordinary person in Little's position could not reasonably have foreseen death as a consequence of a single moderate punch.<sup>5</sup>

During the trial the jury viewed a tape of Little's record of interview in which he expressed genuine surprise and apparent remorse when the interviewing officer told him Stevens was on life support and was not expected to live.<sup>6</sup> The jury were also directed on self-defence, provocation and intoxication.<sup>7</sup> After deliberating, the jury returned a verdict of not guilty of murder or manslaughter. As jury deliberations are confidential, it is not possible to determine with any certainty which defence influenced the jury's decision.<sup>8</sup> What can be said is that the verdict (and two similar cases) outraged the victim's family and the media, which led to the then Queensland Attorney-General requesting the Department of Justice to carry out an audit on defences to homicide.<sup>9</sup> This audit, and a subsequent review by the Queensland Law Reform Commission (QLRC), was illustrative of a world-wide concern about the seeming preponderance of youth dying as a result of so-called alcohol-fuelled violence.<sup>10</sup>

---

<sup>5</sup> *Criminal Code 1899* (Qld) s 23(1)(b). The term 'accident' was deleted from the Code in 2011 when the section was amended by s 4 of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld). It substituted 'an event that occurs by accident' to an event that – (1) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence. However, the *Criminal Code 1913* (WA) s 23B still refers to accident as per the previous Queensland Criminal Code.

<sup>6</sup> Actual footage of the police interview was played on the Australian Broadcasting Commission. See ABC TV, *Australian Story*, 13 August 2007 (Deborah Fleming).

<sup>7</sup> This defence was based on a comment made by Little in his police interview in which he alleged that he had been hit by the deceased, who had previous convictions for assault.

<sup>8</sup> *Jury Act 1995* (Qld) s 70.

<sup>9</sup> ABC TV, above n 6.; Amanda Watt, 'Acquittal 'Says Killing OK' – Family Devastated as Man Admits Unprovoked Bashing Death but Walks Free', *The Courier Mail* (Brisbane), 2 April 2007, 12; Queensland Department of Justice and Attorney-General, 'Audit on Defences to Homicide: Accident and Provocation', (Discussion Paper, October 2007).

<sup>10</sup> Emmaline Stigwood, 'No Jail Time Over Senseless Death', *Gold Coast Bulletin*, 22 June, 2011, 6; Rachel Olding and Nicole Hasham, 'Demand For Tougher Laws On Drunken violence', *Sydney Morning Herald* (online), 3 January 2014, <http://www.smh.com.au/nsw/demand-for-tougher-laws-on-drunken-violence-20140102-3080t.html>.

This thesis investigates the modern day tragedy of needless loss of life from alcohol-fuelled violence, specifically related to deadly ‘one punch’ assaults. Research drawn from the National Coronial Information System has identified more than 90 deaths attributable to ‘one punch’ assaults in Australia between 2000 and 2012.<sup>11</sup> This thesis will include a doctrinal analysis of legislation and case law drawn not only from Australian Code and common law jurisdictions but equivalent overseas jurisdictions that are also grappling with ways of dealing with the tragedy of fatal ‘one punch’ assaults. ‘Doctrine’ has been defined as ‘a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains and makes coherent or justifies a segment of the law as part of a larger system of law’.<sup>12</sup> The thesis compares the responses of the various jurisdictions against the legal norms of causation, justification, excuse, luck, consequences, fair labelling and community expectations. It also seeks to discover if criminal law jurisprudence concerning the liability and punishment of ‘one punch’ killers is still appropriate in the twenty-first century, as criminal law reflects the social, political and cultural values of the period in which it is developed and has been described as a ‘socio-political artefact’.<sup>13</sup> For example, one study has found that in seventeenth century Britain pickpockets and murderers received the death penalty in equal numbers. However, by the eighteenth century a murderer might be executed or exiled to Australia, but a pickpocket would only pay a fine.<sup>14</sup>

---

<sup>11</sup> Jennifer Lucinda Pilgrim, Dimitri Gerostamoulos and Olaf Heino Drummer, ‘“King Hit” Fatalities In Australia, 2000-2012: The Role Of Alcohol And Other Drugs’, (2014) 135 *Drug & Alcohol Dependence*, 119; Phillippe. Lunetta, Antti Penttila and Seppa Sarna, ‘The Role of Alcohol in accident and violent deaths in Finland, (2001) 25 *Alcohol Clin. Exp. Res.*, 1654; Ingeborg Rossow, ‘Alcohol and homicide: a cross-cultural comparison of the relationship in 14 European countries’, (2001) 96 (Supp.1) *Addiction* 577.

<sup>12</sup> Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2010) 197.

<sup>13</sup> Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) 364.

<sup>14</sup> Simon DeDeo, Sara Klingenstein, and Tim Hitchcock, ‘The Civilising Process in London’s Old Bailey’, (2014) 111(26) *Proceedings of the National Academy of Sciences* 9419; Sandra Blakeslee, ‘Computing Crime and Punishment’, *The New York Times*, (online), 16 June 2014. [http://www.nytimes.com/2014/06/17/science/computing-crime-and-punishment.html?\\_r=1](http://www.nytimes.com/2014/06/17/science/computing-crime-and-punishment.html?_r=1)

## 1.2 The problems for criminal law with alcohol fuelled violence

It has been argued that the problems of random and usually drunken street violence in the twenty-first century is a socio-political problem as well as a legal one.<sup>15</sup> This is not a new phenomenon as, according to a recent study where a scientific analysis of 20 million words recorded during 150 years of criminal trials at London's Old Bailey, it was revealed how changes of culture, rather than only changes to the law, facilitated in the reduction of violent crime.<sup>16</sup>

That is, the study had been able to demonstrate that the decline in less serious forms of violence, such as assault, was not led by legislation or moments of dramatic change in the law, but rather by social attitudes.<sup>17</sup> In Australia, a push to change social attitudes has already begun, with a number of organisations established to educate young people regarding the dangers of drunken violence with some reported success.<sup>18</sup> Other legislation, such as restrictions on alcohol trading hours, has also shown some success in reducing violence outside night clubs and hotels.<sup>19</sup>

## 1.3 Tightening the liability of 'one punch' killers

While various Australian legislatures have, in recent times, moved to address the problem of alcohol-fuelled violence by enacting changes to the liquor licensing system, they have also increased sentences for offenders and restricted, if not abolished, what was known in some jurisdictions as the excuse of 'accident' or test of foresight for those charged with an assault that results in the death of the victim.<sup>20</sup> The earlier version of

---

<sup>15</sup> Melissa Burgess and Steve Moffat, 'The Association between Alcohol Outlet Density and Assaults on and around Licensed Premises', (2011) 147 *Crime and Justice Bulletin* 1, 12.

<sup>16</sup> Simon DeDeo, Sara Klingenstein, and Tim Hitchcock, 'The Civilising Process in London's Old Bailey', (2014) 111(26) *Proceedings of the National Academy of Sciences*, 9419, 9420.

<sup>17</sup> Ibid.

<sup>18</sup> A Brisbane surgeon claimed there had been a notable decrease in the number of injuries caused by late-night violence since the introduction of the 'Real Heroes Walk Away' campaign; Daniel Piotrowski, 'Doctor says violence dropped after Heroes campaign', *news.com.au*.(online) October 11 2012.

<sup>19</sup> For instance, the *Liquor Amendment Bill 2014* (NSW) and *Safe Night Out Legislation Amendment Act 2014* (Qld) were introduced to restrict liquor trading hours.

<sup>20</sup> For example in five Australian States there have been amendments to criminal law designed to tighten the liability of those accused of 'one punch' killings i.e. Unlawful Assault Causing Death *Criminal Code 1913* (WA) s 281; Unlawful Assault Causing Death, *Criminal Code 1983* (NT) s 161A; Assault Causing Death *Amendment of Crimes Act 1900* (NSW) s 25A; Unlawful Striking Causing Death

excuse, set out in s 23 of the Queensland Criminal Code, meant that a defendant would not be criminally responsible for an event if she or he did not intend or foresee the event, and an ordinary person in the position of the defendant would not reasonably have foreseen the event as a possible outcome.<sup>21</sup> As Jeremy Horder argues, ‘one of the striking features of almost all systems of criminal law is the primacy of the actual occurrence of harm rather than the simple risk of harm occurring’.<sup>22</sup> Whether changing the liquor laws or abolishing ‘accident’ or increasing sentences will prevent or reduce ‘one punch’ killings is open for debate.<sup>23</sup> Certainly the scholarly work to date<sup>24</sup> on the effect of the proposed changes to the laws relating to ‘one punch’ killings has been sceptical with many arguing the laws will fail to overcome the problem they purport to solve and, in some cases, lead to unintended consequences.<sup>25</sup>

Some politicians maintain that new offences, such as the Northern Territory’s unlawful assault causing death, fill a gap in the law where a ‘one punch’ offender can escape prosecution for manslaughter or murder due to the excuse of ‘accident’ especially where the punch itself is not particularly forceful.<sup>26</sup> In 2008, the then Western Australian Attorney-General, James McGinty MLA said in Parliament when introducing the unlawful assault causing death Bill, that the purpose of the exclusion of the excuse for a charge of unlawful assault causing death was to ensure that the accused in ‘one-punch’

---

*Criminal Code 1899 (Qld) s 302A. Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Bill 2014 (Vic); Crimes Act 1958 (Vic).*

<sup>21</sup> See *Criminal Code 1899 (Qld) s 23(1)(b)*.

<sup>22</sup> Jeremy Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (1993) 12 *Law and Philosophy* 193, 209.

<sup>23</sup> There are also other forms of deadly violence bedevilling the community that are distressingly more prolific like domestic violence. The NSW Bureau of Crime Statistics and Research’s Crime Statistics for June 2014 report that the rate of domestic violence in NSW continues to rise, bucking the trend of most other crimes. Perhaps one of the reasons for the public concern over ‘one punch’ killings is that they are often played out in their full ugliness in public arenas such as outside night spots while domestic violence usually occurs behind closed doors.

<sup>24</sup> The research for this thesis has a time-line of 2015.

<sup>25</sup> Dr Julia Quilter, ‘The Thomas Kelly case: Why a “one punch” law is not the answer’ (2014) 38 *Criminal Law Journal* 16; Jennifer Porter, ‘The Implications of Uncertainty in the Law of Criminal Causation for the One-Punch Homicide Offence in Western Australia’ (2015) 27 (1) *Bond Law Review* 5; Jane Cullen, ‘WA’s ‘One-Punch’ Law: Solution To A Complex Social Problem Or Easy Way Out For Perpetrators Of Domestic Violence’ (2014) 2(1) *Griffith Journal of Law and Human Dignity* 52; Asher Flynn, Mark Halsey and Murray Lee, ‘Emblematic Violence And Aetiological Cul-De-Sacs: On The Discourse of ‘One-Punch’ (Non) Fatalities’ (2016) 56 *British Journal of Criminology* 179.

<sup>26</sup> See for example, Northern Territory Attorney-General and Minister for Justice, John Elferink MLA, Media Release, ‘Gap in Legislation Closed by One Punch Law, 28 November 2012.

homicide cases would not be able to claim that the death was an accident, and to ‘reinforce community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour’.<sup>27</sup>

Most fair-minded people would agree with McGinty as the one principle which stands higher than all others in the criminal law is the sanctity of human life and, as families of victims will attest, the loss of one life is one life too many, and laws that make young men think twice about striking someone should be encouraged.<sup>28</sup> However, an audit by the Queensland Department of Justice and Attorney-General found that very few offenders have been able to successfully avoid conviction by utilising the excuse of lack of foresight, even in cases of moderate violence.<sup>29</sup>

## 1.4 Fair Labelling

Fair labelling is a concept that recognises that a charge brought against an offender should accurately label the nature of his or her guilty act.<sup>30</sup> For the person who kills with ‘one punch’, the preferred charge is usually manslaughter. That is, the unlawful killing of another in circumstances where the essential element of murder is missing, most commonly the intention to cause a specific result on the part of the accused.<sup>31</sup> At common law, this is referred to as involuntary or unlawful act manslaughter and until comparatively recently was regarded as relatively uncontroversial.<sup>32</sup>

However, as noted above, three cases of manslaughter in Queensland involving ‘one punch’ killings in which the then excuse of ‘accident’ was pleaded attracted widespread

---

<sup>27</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210, (James McGinty).

<sup>28</sup> *Wilson v R* (1992) HCA 31, (Brennan, Dawson & Deane JJ); *Inge v The Queen* (1999) 199 CLR 295, 314-315 (Kirby J).

<sup>29</sup> Queensland Department of Justice and Attorney-General, above n 9, 33-39.

<sup>30</sup> ‘Fair labelling’ is a term initiated by Glanville Williams in response to the phrase “representative labelling” coined by Vinerian Professor of English Law at the University of Oxford, Dr Andrew Ashworth in 1981.

<sup>31</sup> John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworths, 8<sup>th</sup> ed, 2013) 255.

<sup>32</sup> Graham Virgo, ‘Back to Basics-Reconstructing Manslaughter.’ (1994) 53(1) *Cambridge Law Journal* 44.

publicity, prompting the then Queensland Attorney-General's decision to commission an audit into the excuse.<sup>33</sup> Submissions were made to create new offences, such as unlawful assault causing death, in a bid to exclude the excuse of accident and presumably close what some have perceived as a gap in the law.<sup>34</sup> It could be argued that this proposed offence more fairly labels a person found guilty of causing a death through one punch than labelling them a manslaughterer. However, the mandatory requirements of unlawful assault causing death may see a guilty person spend more time in prison than someone who has been found guilty of manslaughter, as manslaughter does not carry a mandatory sentence.<sup>35</sup> Therefore, is it necessary to create new offences, when laws already enacted may be more appropriate in fairly labelling 'one punch' killers, such as assault occasioning bodily harm, or grievous bodily harm with the death of the victim treated as an aggravating circumstance?

It could be argued that the difference between charging a 'one punch' offender with assault occasioning bodily harm, rather than manslaughter, is that the offender is sentenced for the moral intention of his or her crime and is consequently more fairly labelled. That is, because a person found guilty of an assault that results in death has received a verdict that more approximates their guilt than if they are found guilty of manslaughter, the second most serious offence on the criminal ladder. Of course, on the contrary, the victim's family could regard this outcome as unreasonable as it does not give proper recognition to the life lost as the result of a crime.

Conversely, an argument could be mounted that jurors are inclined to shrink at the prospect of convicting a young person with an otherwise blameless record of manslaughter, preferring to have the offender convicted of a crime which carries less of a stigma. It may also encourage more offenders to plead guilty, rather than take their chances with a possible acquittal of a murder or manslaughter charge. Notwithstanding

---

<sup>33</sup> Department of Justice and Attorney-General, 'Audit on Defences to Homicide: Accident and Provocation', (Discussion Paper, October 2007), 1.

<sup>34</sup> Queensland Law Reform Commission, above n 1, 105.

<sup>35</sup> The Queensland Unlawful Assault Causing Death Amendment Bill of 2007 mandated that a person guilty of this offence was liable for 7 years imprisonment. The New South Wales offence of Assault Causing Death results in a maximum penalty of 25 years imprisonment and a minimum of eight years if the offender commits the offence when intoxicated.

the possible prospect of more convictions, it does not deprive a person facing any of the three charges of successfully pleading the excuse of a lack of foresight. However, it does give the prosecution a necessary alternative charge, where the circumstances justify it, to put before the jury for their consideration.

## **1.5 Correspondence Principle**

To the jurist, the occasional acquittal for an offender charged with manslaughter as the result of a death from a single punch comes as no surprise, as the requirements of *mens rea*, or its equivalent in the various jurisdictions, and what has become known as the Correspondence Principle.<sup>36</sup> Under that principle, offenders should only be judged on what they intended, and not the consequences of their unlawful act. For example, an offender who only intends an assault should be charged with assault causing death because his victim, through an unfortunate and unforeseen circumstance, has died. The resultant death, however, can be treated as an aggravating circumstance to be taken into account during the sentencing process. However, there is a danger that a charge less serious than manslaughter could lead to a perception, especially by the victim's family, that a conviction for an aggravated assault does not reflect the seriousness of the fact that a life has been lost.

Furthermore, the availability of extra offences such as assault occasioning bodily harm with death as an aggravating circumstance would lengthen a judge's charge to a jury, and could mean the advent of 'compromise' verdicts, which do not satisfy the prosecution or the defence. Of course, cases where more excessive violence has been used tend to be less problematic as the outcome is readily foreseeable. It should be acknowledged however, these arguments may hold little weight with the victim's relatives and the public, and too great a departure from the attitude of the public may undermine support for the law.<sup>37</sup>

---

<sup>36</sup> Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law', (2008) 11 *New Criminal Law Review* 232, 236.

<sup>37</sup> David Indermaur and Lynne Roberts, 'Confidence in the criminal justice system' (2009) 387 *Trends and Issues in Criminal Justice*, 1.

On the other hand, a crime is not necessarily worse because someone dies. For instance, if a practical joker trips a friend up intending only to engage in some light-hearted horseplay, and the friend cracks his or her head on the ground, then the practical joker is only guilty of assault occasioning bodily harm, or grievous bodily harm if he or she only foresaw that there was a risk of some harm. As Fitzwilliam College Law Fellow Nicola Padfield argues, a higher level of culpability is more appropriate if the practical joker is to be charged with manslaughter.<sup>38</sup> That is, the practical joker must have been aware of the possibility of *serious* harm resulting from his or her action and so would a reasonable person. This satisfies the correspondence principle that an offender should only be judged on what they intended, and not the consequences of their unlawful act. It also satisfies the principle of *mens rea* that conviction for a serious crime should depend on proof not simply that the defendant caused an injurious result to another, but that his or her state of mind when so acting was culpable.<sup>39</sup>

As a Western Australian judge has observed, it is sometimes the case that when death occurs as the result of an unlawful act, it is a consequence which has little to do with the gravity of the offence, or the degree of criminality by the offender.<sup>40</sup> For example, the use of potentially fatal force may not result in a death due only to heroic and extraordinary efforts of medical intervention and timely resuscitation. Conversely, a relatively minor assault may cause death because of the absence of medical attention or inevitable delay in providing it. These considerations reveal that a wide spectrum of events and circumstances exist in which an unlawful assault resulting in death may be committed, and the degrees of culpability of offenders therefore also may differ between wide extremes.

Therefore, there is arguably a need to consider better ways of reconciling the culpability of offenders when dire and unexpected consequences flow from their unlawful actions. For example, it may be that charging alternative offences would be more appropriate in

---

<sup>38</sup> *R v Lavender* [2005] 222 Crim LR 67; Nicola Padfield, 'Manslaughter: The Dilemma Facing the Law Reformer' [1995] *Journal of Criminal Law* 291, 294.

<sup>39</sup> This is the meaning of *actus non facit reum nisi mens sit rea* as was pointed out by Lord Bingham in *R v G & Anor* [2003] UKHL 50.

<sup>40</sup> *Western Australia v JWRL (No 4)* [2009] WASC 392, [16] (Heenan J).



circumstances which do not justify the possibility of a murder or manslaughter conviction.

## 1.6 Alternative charges

Alternative charges are not prescriptive, but they are governed by the trial judge's duty to ensure a fair trial according to the law.<sup>41</sup> The Queensland Court of Appeal, for instance, has held that whenever an alternative verdict 'fairly arises for consideration on the whole of the evidence' then failure to leave it to the jury *prima facie* deprives the accused of a chance of acquittal of the principal offence.<sup>42</sup> However, as Kiefel J (with whom Hayne, Heydon and Crennan JJ agreed) stated in *R v Keenan*:

A trial judge's duty to ensure a fair trial does not mean that the lesser charge must be left to a jury in every case. It is a question of what justice to the accused requires. Putting the lesser charge to a jury might jeopardise the accused's chance of a complete acquittal in some cases.<sup>43</sup>

It should be noted however, that for forensic reasons, a decision is often made by defence counsel not to expose the accused to the risk of being found guilty of an alternative lesser offence. In reality, this means that the defence is often prepared to 'roll the dice' with the lack of foreseeability excuse in the hope of an acquittal, and the prosecution might resist what they may describe as the 'soft option' of a lesser offence.<sup>44</sup>

In some respects, the alternative charges for a 'one punch' homicide parallel the charge of vehicular homicide. The charge in many instances of a death caused by dangerous driving might more appropriately be manslaughter, but prosecutors in the United Kingdom, for instance, long ago ceased bringing the charge because of a reluctance of juries to bring in guilty verdicts.<sup>45</sup> While this thesis agrees with the scholarly work to

---

<sup>41</sup> *R v Willersdorf* [2001] QCA 183, 17.

<sup>42</sup> *Ibid* 20. Followed in *R v Mead* [2010] QCA 370, 22; *R v MBX* [2013] QCA 214.

<sup>43</sup> *R v Keenan* (2009) 236 CLR 397, 438.

<sup>44</sup> The Queensland Department of Justice and Attorney-General, above n 9, 16. It noted that one of the reasons that the prosecution may not charge alternative verdicts on an indictment was that it may encourage the jury to return a 'compromise verdict'.

<sup>45</sup> Law Commission for England and Wales, 'Legislating the Criminal Code: Involuntary Manslaughter', (No 237, Part III 1996) 63; J Herring and E Palser, 'The Duty of Care in Gross

date that characterises the new ‘one punch’ laws as another example of criminal law that is devoid of principle and coherence it differs by advancing the argument that there are *already* laws in place that could adequately deal with the so-called ‘gap’ in the law where manslaughter is defined in a way that means it will usually not apply in ‘one punch’ deaths.<sup>46</sup> That is because in the hierarchy of personal violence crimes most ‘one punch’ attacks are more akin to an aggravated assault rather than a form of homicide.<sup>47</sup> Therefore, in certain ‘one punch’ assaults that result in death the coherent and fair charge corresponding with the offender’s *mens rea* is one of assault with the death treated as an aggravating circumstance and the sentence adjusted accordingly.

## 1.7 Community expectations

It should be noted, in Australia at least, there has been a significant change in expectations regarding persons accepting responsibility for their own actions.<sup>48</sup> For instance, this has been manifested in tort law, where major changes to the law of negligence have been implemented by statute over the past decade, on the basis that the judiciary had become too plaintiff-orientated and needed to restore an appropriate balance between personal responsibility for one’s own conduct, and expectations of proper compensation.<sup>49</sup>

In the United Kingdom, the courts in recent years have been increasing the sentences for those convicted of ‘one punch’ killings.<sup>50</sup> For example, a teenager was convicted of murder in 2013, and will serve at least ten years, after a man he punched fell against the pavement and died.<sup>51</sup> On the other hand, an appeal by the UK Attorney-General alleging

---

Negligence Manslaughter’ [2007] *Criminal Law Review* 17, 24; Model Criminal Code Officers Committee (Cth), ‘Fatal Offences Against the Person’ (Discussion Paper, 1998) 161.

<sup>46</sup> Julia Quilter, ‘One-punch Laws, Mandatory Minimums and ‘Alcohol-Fuelled’ as an Aggravating Factor: Implications for NSW Criminal Law’ (2014) 3 (1) *International Journal for Crime, Justice and Social Democracy* 81-106.

<sup>47</sup> See the remarks of Murray J in *Western Australia v Warra* [2011] WASCR 17.

<sup>48</sup> Jim Spigelman, ‘Tort Law reform: An overview’ (2006) 14 *Tort Law Review* 5, 6.

<sup>49</sup> See, *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512.

<sup>50</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>51</sup> ‘Bolton teenager Eden Lomax sentenced for Bolton murder’, *BBC News* (Manchester), 9 December 2013.

undue leniency for a four year manslaughter sentence given to a man who killed another with a single punch, was dismissed by the Court of Appeal.<sup>52</sup> In his leading judgment, Lord Justice Treacy said it was important for a court to examine the nature of the blow which was struck, and a distinction should be drawn between a relatively modest blow which, by some unusual combination of circumstances, results in the death of the victim, and more serious violence.<sup>53</sup>

Generally, where a person dies as the result of violence, the perpetrators are charged with murder or manslaughter. These are two of the most serious charges available in criminal law, but do they always correspond with the intent of the crime and, further, might there be a danger that the accused may be unfairly convicted? For example, a murder conviction may follow in cases where no realistic threat to life is intended and, even in cases where intending not to kill, the accused takes pains to minimise the risk of death.<sup>54</sup> This could be seen by the judiciary as too significant a gap between what was foreseen or foreseeable (namely some relative minor injury) and what the assailant is held liable for (namely causing death). The gap would be considerably closer if the assailant intends to inflict serious injury, and therefore, should death result, is convicted of manslaughter or murder.

There is also the danger that the more serious types of killing described by the term ‘manslaughter’ could come to be regarded as less serious because they carry the same descriptive label as other forms of killing. Furthermore, there does not appear to be much evidence that condign punishment deters street violence, which is generally confined to drunken youths who, by definition, are not thinking of consequences, and nor can deterrence logically have a part to play in relation to a consequence which is neither foreseen nor reasonably foreseeable.<sup>55</sup> Furthermore, neuroscientists have long

---

<sup>52</sup> Attorney General Reference No 16 of 2014, Court Of Appeal – Criminal Division, May 07 2014 [2014] EWCA Crim 956; ‘Lewis, Gill: Bournemouth death punch sentence reviewed’, *BBC News* (Dorset), 26 February 2014.

<sup>53</sup> Attorney General Reference No 16 of 2014, Court Of Appeal – Criminal Division, May 07 2014 [2014] EWCA Crim 956 para.20.

<sup>54</sup> See John Williams, ‘Casualties of Violence in Northern Ireland’ (1997) 3 *International Journal of Trauma Nursing*, 78-82 which details practices such as the breaking of limbs or knee-capping adopted by the terrorist group The IRA for purposes of punishment.

<sup>55</sup> Michael Tonry, ‘Learning from the Limitations of Deterrence Research’ in Michael Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2008) Vol 37, 239, 401.; Andrew

recognised that adolescents are prone to display risky behaviour for a number of reasons relating to developmental changes to brain function.<sup>56</sup> As one scientist has written, the risk-taking of adolescents may be fostered by immature inhibitory control system, leading adolescents to react impulsively under some circumstances, particularly in emotional situations when they are with peers and where logical decision-making abilities may be suppressed.<sup>57</sup>

Therefore, the questions this thesis seeks to address are as follows:

- Should a ‘one punch’ killer still be able to escape conviction by pleading that the victim’s death was an unintended and unforeseeable consequence; and an ordinary person would not reasonably foresee as a possible consequence?
- Do the new offences which have been introduced in some jurisdictions that exclude this defence, adequately solve the issue?
- Are there other alternative offences available that more fairly label the offender’s crime?

## 1.8 Chapter Outlines

The following eight chapters will justify why those who cause death unforeseeably by way of minor violence, should be labelled in a fairer and normatively just way than is currently the case, in order to achieve a coherent, logical and consistent system of law. It will also investigate why prosecutors generally prefer the charge of dangerous driving causing death, when the facts often indicate manslaughter is the more appropriate indictment while, on the other hand, the application of comparatively minor violence to another that results in death, almost always leads to a murder or manslaughter charge.

---

von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, (Hart Publishing, 1999)36.

<sup>56</sup> R M Trimpop, J H Kerr and B D Kirkcaldy, ‘Comparing personality constructs of risk-taking behavior’, 26 *Personality & Individual Differences* [1999] 237, 254.

<sup>57</sup> Linda Patia Spear, *The Behavioral Neuroscience of Adolescence* (W W Norton, 2010) 136.

### **1.8.1    *Chapter 2– Unintentional and unforeseen acts***

This chapter begins with a thorough review of exactly what an ‘accident’ or an unintentional and unforeseen act is for the purposes of criminal law and how it works in practice. This chapter will then traverse what the meaning of an ‘act’ or ‘event’ which occurs by accident is, and how it is interpreted under the law in various jurisdictions. It will also look at alternative offences that may be preferred instead of murder or manslaughter and whether law reform is desirable.

### **1.8.2    *Chapter 3 – Justification/Excuse***

The chapter introduces the theory of excuse in criminal law, and in particular, how they relate to death caused by minor violence. It also distinguishes between justification and excuse, and why this is relevant in criminal law. Intoxication is discussed and its relevance in terms of the excuse of a lack of foresight; this is because intoxication is often a live issue in ‘one punch’ killings.

### **1.8.3    *Chapter 4– Luck & Fair Labelling***

The question of luck is the theme of this chapter, and how it can be consistent with the demands of justice in allowing ‘outcome luck’ to make such a dramatic difference to an offender’s criminal liability. This chapter defines ‘luck’ and the morality of the definition in terms of criminal law, and then looks at the appropriateness of attaching a heavier punishment to dangerous conduct if it causes death. This leads to a discussion of the correspondence principle, where it is said the label of any offence ought to fairly represent the offender’s wrong doing. Therefore, in terms of minor violence causing death, is it fair to label a person as a murderer or manslaughterer where the harm intended was not serious? The proportionality principle - whether the punishment for a given crime should be proportional to that crime’s seriousness - is also considered, especially in regards of sentencing.

### **1.8.4    *Chapter 5 – Community Expectations***

This chapter looks at the correlation between fair labelling and community expectations of what the law should be for ‘one punch’ killers. The genesis of this thesis arose from perceived community concerns in Queensland regarding the future of the excuse of accident (as it then was), and how if a law is to be regarded as good law, it should in some sense represent the social consensus. This chapter then leads to an examination of

the jury's role where it is asked to adjudicate on charges involving minor violence, and accusations that they do not fully comprehend a judge's often complex instructions when the excuse of accident is raised.

#### **1.8.5    *Chapter 6 – Foreseeability, causation & consequences***

Foreseeability, and the use of both objective and subjective tests to determine what is and what is not an accident drives this chapter. Whether an event is foreseeable, in this case the death of the victim, is crucial to deciding the culpability of the offender is discussed, as is what sort of test is the most efficient and fairest to both the accused and the victim. Also discussed in this chapter is the significance of causation, which is the link between the conduct of the accused and its consequence. That is, did the act cause the injury or death of the victim? This chapter looks at the tests of reasonable foreseeability, substantial cause and natural consequences, all of which have found favour with different courts at different times.

#### **1.8.6    *Chapter 7 – Alternative Offences***

Alternative offences to murder or manslaughter are the subject of this chapter. This is because some jurisdictions, unhappy with the availability of the excuse of a lack of foreseeability of death, have enacted offences such as unlawful assault causing death or killing by gross carelessness, so that offenders do not escape conviction if they defeat the more serious charges of murder or manslaughter. The success of these new laws has been mixed, and this chapter argues that there is no need to enact more offences as offences already exist which cover any perceived lacuna in the law.

#### **1.8.7    *Chapter 8 – A Normative Approach to unforeseeable events that result in death***

The penultimate chapter adopts as its theme a normative approach of how to deal justly with unlawful, unforeseeable events that result in death. It argues the excuse of unforeseeability is a necessary element of a fair justice system when adjudicating on acts of minor violence that lead to death, and should not be dispensed with, especially as the introduction of alternative offences do not appear to have been successful and are more of a response to penal populism than sound law reform.

### **1.8.8    *Chapter 9 – Conclusion***

The final chapter summarises the thesis chapters and argues that the trend towards concentrating on the consequences of a crime, rather than the criminality of the offender, does not always lead towards just solutions. There are, it is argued, better and more effective ways of dealing with drunken, mindless violence than inventing new laws. If there is a gap in the law concerning ‘one punch’ killers, it argues, there are already laws on the statute books that justly deal with this crime. As always, it concludes, the goal is justice.

## 2 UNINTENTIONAL AND UNFORESEEN ACTS

### 2.1 Criminal Culpability

This chapter will discuss criminality as it relates to unintentional and unforeseen acts, and the legislative responses from various jurisdictions to the events that arise from unintentional acts or what are commonly called ‘accidents’. It will include a review of the cases that have influenced the judiciary and the legislature, and will also examine the variety of charges that can and have been preferred against offenders accused of mainly violent behaviour that has led to the death of their victims.

Therefore, as a starting point, it is worthwhile to consider exactly what a crime is. From a strictly legal perspective, Glanville Williams states that a crime is ‘a legal wrong that can be followed by criminal proceedings and which may result in punishment’.<sup>58</sup> The Queensland Criminal Code is no more explicit, defining an offence as an act or omission which renders the person doing the act or making the omission liable to punishment.<sup>59</sup> However, in *R v Stuart*, Gibbs J said that when discussing offences committed in prosecution of common purpose, the word offence as defined by s 2, ‘means an act or omission done or made in such circumstances as to render the person doing it liable to punishment – a punishable act or omission’.<sup>60</sup> His Honour observed that in most cases an act or omission alone does not render a person liable to punishment; whether it does so may depend on the quality of the act, the intention which accompanied it, its consequences or other circumstances.<sup>61</sup> A fuller definition is that ‘crime’ is ‘an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings, normally instituted by officers in the service of the Crown’.<sup>62</sup>

---

<sup>58</sup> Glanville Williams, *Textbook of Criminal Law* (Stevens, 2<sup>nd</sup> ed, 1983) 27.

<sup>59</sup> *Criminal Code 1899* (Qld) s 2 Definition of an offence.

<sup>60</sup> *R v Stuart* (1974) 134 CLR 426.

<sup>61</sup> *Ibid.*

<sup>62</sup> Leslie Rutherford & Sheila Bone (eds), *Osborn’s Concise Law Dictionary* (Sweet & Maxwell, 10<sup>th</sup> ed, 2005) 123.



However, while these definitions generally account for the rules and principles for identifying and punishing proscribed conduct, they do not accurately identify the wrongful quality of that conduct. As Bronitt and McSherry perceptively write, ‘Crime is simply whatever the law-makers at a particular time have decided is punishable as a crime’.<sup>63</sup> Other criminal theorists argue that the definition of crime complies with Mill’s ‘harm principle’,<sup>64</sup> which states that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That is, the only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others.<sup>65</sup>

Most people, it is argued, believe that they could accurately identify crimes such as murder, rape, theft and assault. However, beyond these ‘obvious’ crimes it becomes increasingly difficult to define what a ‘crime’ actually is. As Clough and Mulhern point out, conduct that is not normally regarded as criminal may become so by statute, yet conduct that is considered by some to be morally wrong, for example, adultery, is not necessarily classed by the law as criminal.<sup>66</sup>

Waller and Williams argue that the distinction between criminal and non-criminal misdeeds is based upon more than an arbitrary designation.<sup>67</sup> They take the view that a decision to designate conduct as criminal is generally based upon the existence or non-existence of two factors inherent in all crimes. That is, the conduct in question must be injurious to the public at large as opposed to merely being injurious to one or more individual persons. However, as Bagaric and Arenson point out, this view is problematic for several reasons.<sup>68</sup> First, almost all torts and other civil wrongs could easily be classified as conduct that is ‘injurious to the public at large’. The crime of assault, for example, constitutes the tort of battery, theft and the tort of conversion.

---

<sup>63</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co., 3<sup>rd</sup> ed, 2010) 6.

<sup>64</sup> Jeremy Gans, *Modern Criminal Law of Australia*, (Cambridge, 2012) 98.

<sup>65</sup> John Stuart Mill, *On Liberty* (Longman, Roberts & Green, 2<sup>nd</sup> ed, 1869) 22.

<sup>66</sup> Jonathan Clough and Carmel Mulhern, *Criminal Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2004) 3.

<sup>67</sup> L Waller, and C R Williams, *Criminal Law* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2001) 2-3.

<sup>68</sup> Mirko Bagaric and Kenneth J. Arenson, *Criminal Laws in Australia* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 4.

Therefore, the question is: should a decision about categorising the very same conduct and its consequences as ‘injurious to the public at large’ turn on whether it is being prosecuted criminally or civilly?<sup>69</sup>

Theoretically a person who loses a family member through a crime can sue for that loss civilly, as per the OJ Simpson case<sup>70</sup>. This practice rarely seems to be pursued but perhaps could be looked at in the future, so that victims and/or their families can seek another form of redress other than solely through the criminal law. The use of civil law has been acknowledged by Mitchell, who writes that:

There is no doubt that the criminal justice system should not simply ignore the concerns of victims of crime, but in trying to strike an appropriate balance between their legitimate expectations and those of offenders, we should not forget there is a separate arm of the legal process, the civil system, which is traditionally the forum in which victims can seek adequate redress.<sup>71</sup>

Some avenues of redress are already available, with victims of crime in many jurisdictions able to obtain financial assistance or compensation through schemes such as victims of crime compensation.<sup>72</sup> In Queensland, for example, family members or dependents of a person who has died as the result of a criminal act can make application for up to \$100,000 in financial assistance.<sup>73</sup> Other jurisdictions base similar legislation on a compensation model. However, it must be acknowledged that the effect of monetary compensation is unlikely to adequately appease or provide any meaningful solace for victims, but does provide evidence that the state recognises the widespread ramifications of serious crime, and acts as another form of punishment in situations where the defendant is ordered to contribute to the compensation.

---

<sup>69</sup> Ibid 5.

<sup>70</sup> The OJ Simpson murder case (*People of the State of California v Orenthal James Simpson* [1995] Case No. #BA097211, Los Angeles Superior Court), acquitted October 3, 1995) has been described as the most publicised criminal trial in American history. Simpson, a former professional football star and actor was tried and acquitted of the murder of his ex-wife, Nicole Brown Simpson and a waiter, Ronald Lyle Goldman. Later both the Brown and Goldman families successfully sued Simpson for damages in a civil trial for wrongful death.

<sup>71</sup> Barry Mitchell, ‘Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-Punch Killers’ (2008) 72 *The Journal of Criminal Law* 537, 546.

<sup>72</sup> *Victims of Crime Assistance Act 2009* (Qld); *Victims Compensation Act 1996* (NSW); *Victims of Crime Assistance Act 1996* (Vic).

<sup>73</sup> *Victims of Crime Assistance Act 2009* (Qld).

In an historical context, before 1066, animals and objects causing serious damage or even death were called *banes*, and were handed over directly to the victim in a practice known as noxal surrender.<sup>74</sup> Early legislation also directed people to pay specific sums of money, called *wergild*, as compensation for actions that resulted in someone's death.<sup>75</sup> Clearly these actions are unlikely to be revived, but the idea of moral blameworthiness for crimes of negligence is another issue. In these circumstances, it is arguable whether the accused's conduct, although deserving of punishment, always involves an element of moral wrongdoing. To think otherwise leads us towards the anathema of strict liability. In criminal law, as with tort, there should be 'no liability without fault', especially where serious outcomes are involved. Simester and Sullivan argue that if a person is not to blame when something goes wrong, the censure of the criminal law is not appropriate.<sup>76</sup> Therefore, in so far as possible, criminal offences should be structured so that there can be no conviction without fault. This is achieved by including within every criminal offence some element that reflects culpability.<sup>77</sup>

Clearly, unlawfully assaulting another person is a crime deserving of punishment. However, in the case of a minor assault that unfortunately causes death, does the consequence of death mean the defendant is more culpable, and therefore more worthy of condign punishment? Furthermore, is there a moral link between an assault on a victim and the victim's death? The wickedness of the assault, it could be argued, relates to the causing of minor harm and not to the evil of causing death. That is, the mere fact that an injury has resulted from the commission of an illegal act may not be enough to satisfy the test of criminality for a serious crime such as manslaughter. There must be something more, and that is, the consequence of the act must have been reasonably

---

<sup>74</sup> Noxal surrender was a provision of Roman law in the case a delict was brought against the head of a family for a wrong committed by a son or slave. The defendant had the option in that instance of surrendering the dependent rather than paying full damages. See, Alan Watson, *Roman & Comparative Law* (University of Georgia Press, 1991) 75.

<sup>75</sup> Wergild was a value placed on every human being and every piece of property in the Salic Code. Also known as 'man price.' If property was stolen or someone was injured or killed, the guilty person would have to pay wergild as restitution to the victim's family or to the owner of the property. Oxford University Press, *Oxford English Dictionary* (at 4 September 2009).

<sup>76</sup> Andrew P Simester & GR Sullivan, *Simester and Sullivan's Criminal Law* (Hart Publishing (4<sup>th</sup> ed, 2010) 7.

<sup>77</sup> *Ibid* 8.

foreseen by the offender and the ordinary person who could not reasonably foresee the end result as a possible consequence.<sup>78</sup>

The question therefore, is whether it is unfair for a person to be culpable for something they could not foresee, and if they are not culpable, should they be subject to criminal sanctions? As Fletcher writes, in the case of an assault resulting in death, there is no differential culpability beyond the risk to life implicit in the assault.<sup>79</sup> If the offender is held guilty of murder, his or her liability depends on chance, which is the death, for which he or she is not incrementally culpable. Liability, he argues, is contingent on a fortuity, and it therefore erodes the relationship between criminal liability and moral culpability.<sup>80</sup> There is much debate over the issue of the relevance of harm.<sup>81</sup> Robinson believes that harm is a *sine qua non* of criminal liability,<sup>82</sup> while Schulhofer argues that harm should never be relevant in assessing criminal liability.<sup>83</sup> However, neither of these views has been fully embraced by the courts.

An assault that results in an unexpected death is a tragedy for all participants. Certainly for the deceased, but also for some accused who are sentenced to a long term of imprisonment as well as a lifetime of regret knowing that he or she have unnecessarily taken a life.<sup>84</sup> Furthermore, while the accused may feel morally burdened with the victim's death, this probably would not be the case if the victim suffered only a minor injury.

It appears the public can present conflicted views over the extent of criminal culpability where a life has been lost through a minor assault. In a study by Mitchell, the majority of interviewees felt there should be no prosecution for homicide of a man who *gently*

---

<sup>78</sup> *Queensland Criminal Code 1899* s 23 Intention – motive.

<sup>79</sup> George Fletcher, *Rethinking Criminal Law*, (OUP USA, 2000) 299.

<sup>80</sup> *Ibid* 300.

<sup>81</sup> See, for example, Paul Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California Law Review* 266 and Steven Schulhofer, 'Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law' (1974) 12 *University of Pennsylvania Law Review* 1497.

<sup>82</sup> Robinson, above n 74, 266.

<sup>83</sup> Schulhofer, above n 74, 1497.

<sup>84</sup> See "Wicklows man acquitted of manslaughter of his sister's boyfriend" *The Irish Times* 6 July 2004.

pushes his victim who then hits her head against a wall and dies, because he bears no moral responsibility for causing death.<sup>85</sup> Interviewees were then invited to indicate what level of violence and blameworthiness would be necessary to justify such responsibility and render the man guilty of manslaughter. According to Mitchell, without exception they found this very difficult.<sup>86</sup> The question was then approached in stages, beginning with the original scenario in which the woman is at first gently pushed and then supposed that gradually more force was used. No participants in the study believed that simply pushing the woman a little more forcefully so as to cause bruising or cuts which amounted to 'actual bodily harm' would justify a manslaughter charge.<sup>87</sup> In such a case there may be liability for an appropriate assault, but perhaps not for a homicide offence.

Of course, it does not necessarily follow that the law should invariably reflect what is perceived by a relatively small sample of people, as they may, for example, be basing their judgements on limited knowledge or misunderstandings. Nevertheless, the participants involved in the survey would probably be armed with more knowledge than most, so the legislature should view these types of studies with interest. What is essential is that law makers have to decide what the minimum moral culpability requirements should be, in order to justify the imposition of criminal responsibility and liability for a consequence as serious as death.<sup>88</sup>

## **2.2 Unforeseen events**

In the context of unforeseen or unforeseeable events, the word 'accident' is one which comes up for some critical discussion in the criminal law. However, it is not defined in Code or common law jurisdictions in Australia. In fact, the word only appears in s 23B

---

<sup>85</sup> Barry Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 (3) *British Journal of Criminology* 453, 469.

<sup>86</sup> Barry Mitchell, 'Further evidence of the relationship between legal and public opinion on the law of homicide' [2000] *Criminal Law Review* 814, 819.

<sup>87</sup> *Ibid* 820.

<sup>88</sup> Mitchell, above n 66, 546.

of the Western Australian Criminal Code, having earlier been omitted from s 23(1)(b) of the Queensland Code in 2011.<sup>89</sup>

Understood generally, an accident is usually considered to convey an occurrence that happens without fault. That is, something tragic brought about by a random unexpected act. The word, however, is used loosely in common speech - even motor vehicle crashes involving blatant negligence are sometimes described as ‘accidents’.<sup>90</sup> The word is derived from the Latin *accidere* – to happen, and some of the meanings of the word given in the Macquarie Dictionary are ‘an unfortunate happening: or a mishap by chance’.<sup>91</sup> The Concise Oxford Dictionary defines accident as an ‘Event without apparent cause, unexpected, unforeseen course of events; unintentional act, chance, fortune, mishap.’<sup>92</sup> Aristotle said ‘Accidents are happenings which are unexpected, and do not arise from wickedness.’<sup>93</sup> Holmes wrote that ‘anything is an accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid.’<sup>94</sup> An exacting definition of ‘accidental’ was given in Stephen’s *Digest of Criminal Law* around 90 years ago:

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such an act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.<sup>95</sup>

However, as Gleeson CJ said in *Stevens v The Queen*, the word ‘accident’ is of notoriously imprecise connotation.<sup>96</sup> This might also account for Dixon CJ’s description of the provision in the *Tasmanian Criminal Code* (‘an event which occurs by chance’) as a ‘somewhat difficult phrase’.<sup>97</sup> Although attempting to discern the

---

<sup>89</sup> The section was amended, with effect from 4 April 2011, by s 4 of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

<sup>90</sup> See, for example, *Gray v Motor Accident Commission* (1998) 196 CLR 1, 21.

<sup>91</sup> The Budget Macquarie Dictionary (The Macquarie Library, 3<sup>rd</sup> ed, 1998) 4.

<sup>92</sup> H W Fowler & F G Fowler (Clarendon Press, 5<sup>th</sup> ed, 1964) 9.

<sup>93</sup> Rhetoric, I, xiii 16.

<sup>94</sup> Oliver Wendell Holmes jnr *The Common Law* (Little Brown, 51<sup>st</sup> ed 1963) 76.

<sup>95</sup> Sir James Fitzjames Stephens, *A Digest of the Criminal Law: (Crimes and Punishment)* (Sweet and Maxwell, 7<sup>th</sup> ed, 1926) 141.

<sup>96</sup> *Stevens v The Queen* (2005) HCA 65, para 16.

<sup>97</sup> *Vallance v The Queen* (1961) HCA 42.

proper content of the word ‘accident’ has been said to lead to a ‘Serbonian bog’ of technicalities, in every case it takes its meaning from the context.<sup>98 99</sup>

Not surprisingly, the word ‘accident’ appears regularly in workers’ compensation statutes, but as noted in *Murray v R* where accident then appeared in the Queensland Criminal Code, it was obviously intended to be left to juries to understand and to apply as an ordinary expression of the English language.<sup>100</sup> The particular facts and circumstances determine the cases where an ‘accident’ arises, and it is in light of them that the actions of an accused and the responses of the ordinary, rational person are to be judged and assessed. It is interesting to note that in Aboriginal lore when a person dies, it is regarded as a catastrophe, not an accident. That is, death is always the fault of someone or that person’s relatives.<sup>101</sup>

**Fig. 1 Accident or intention and motive statutes in Australian Criminal Code States.**

Queensland	s 23 Criminal Code 1899	Intention - motive
		<p>Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for –</p> <p>An act or omission that occurs independently of the exercise of the person’s will; or</p> <p>An event that-</p> <p>The person does not intend or foresee as a possible consequences; and</p> <p>An ordinary person would not reasonably foresee as a possible consequence.</p>

<sup>98</sup> *National & General Insurance Co Ltd v Chick* [1984] 2 NSWLR 86, 91;

<sup>99</sup> *Saviane v Stauffer Chemical Co (Australia) Pty Ltd* [1974] 1 NSWLR 665, 668.

<sup>100</sup> (2002) HCA 26, 100 (Gummow and Hayne JJ).

<sup>101</sup> *R v Minor* [1992] 2 NTLR 183, 193 (Mildren J); referring to the evidence of Gerhard Stoll.

<b>Western Australia</b>	<b>s 23B Criminal Code 1913</b>	<b>Accident</b>
		<p>This section is subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions.</p> <p>A person is not criminally responsible for an event which occurs by accident.</p>

<b>Tasmania</b>	<b>s 13(1) Criminal Code 1924</b>	<b>Intention and motive</b>
		<p>No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.</p>

<b>Northern Territory</b>	<b>s 31 Criminal Code 1983</b>	<b>Unwilled Act etc. and accident</b>
		<p>A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequences of his conduct.</p> <p>A person who does not intend a particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.</p>



## 2.3 History of s 23 in the Queensland Criminal Code 1899

In his explanatory letter of 29 October 1897 to the Attorney-General forwarding the draft Criminal Code, Sir Samuel Griffith said:

The general rules of criminal responsibility set out in s 25 [s 23, as enacted] render it unnecessary to express the elements of malice in the case of injuries to the person, unless an intention to cause a specific result is expressly made an element of the offence, actual knowledge of the probable effect of the act is immaterial.<sup>102</sup>

The law as stated, was that an accused charged with a ‘one punch’ killing would be liable, regardless of whether or not he or she had knowledge that their act of violence would result in a death.

In preparing his draft Code, Griffith drew freely on the labours of the Commissioners who had revised English judge Sir James Fitzjames Stephen’s Criminal Code.<sup>103</sup> However, unlike Stephen, Griffith had attempted to state exhaustively the conditions which operate as justification or excuse for acts otherwise criminal.<sup>104</sup> He said that he had included numerous provisions not found in Stephen’s Code, which he believed to be either correct statements of the common law or propositions that ought to be recognised as law. In drafting the Queensland Criminal Code, Griffith consulted a number of the Continental Codes, deriving ‘very great assistance’<sup>105</sup> from the Italian Penal Code produced at the instigation of that country’s Minister for Justice, Signor Zanardelli.<sup>106</sup> He also said that he had frequent recourse to the Penal Code of the State of New York.

---

<sup>102</sup> Explanatory Letter, note 2, ppiv, vii. As quoted by M.J Shanahan, P.E Smith, and S.Ryan, *Carter’s Criminal Law of Queensland*, (LexisNexis Butterworths, 18<sup>th</sup> ed, 2011) 106.

<sup>103</sup> Rupert Cross, ‘The Making of English Criminal Law Sir James Fitzjames Stephen’ (1978) 6 *Criminal Law Review* 652.

<sup>104</sup> Explanatory Letter, note 2, ppiv, vii. As quoted by Shanahan, M.J., Smith, P.E. and Ryan, S., *Carter’s Criminal Law of Queensland*, (LexisNexis Butterworths, 18<sup>th</sup> ed, 2011).

<sup>105</sup> Sir Samuel Griffith, *Explanatory Letter to Draft of a Code of Criminal Law* (Government of Queensland, Brisbane, 1897) iv.

<sup>106</sup> See R O’Regan, ‘Sir Samuel Griffiths Code’ (1991) 7 *Australian Bar Review* No 2, 141; Geraldine Mackenzie, ‘An enduring influence: Sir Samuel Griffith and his contribution to Criminal Justice in Queensland’ (2002) 2 (1) *Queensland University of Technology Law & Justice Journal* 53.

According to former Australian High Court judge and Chief Justice, Sir Harry Gibbs, one weakness of the Stephen Code was its failure to deal satisfactorily with the general principles of criminal responsibility.<sup>107</sup> Griffith dealt with this subject in Chapter Five of the Queensland Criminal Code. The first paragraph of s 23, which stated that:

subject to the express provisions of this Code relating to negligent acts or omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

This corresponded to Article 45 of Zanardelli's Italian Code, which in Griffith's view concisely stated a principle of the criminal law 'not peculiar to any locality or any special system of jurisprudence.'<sup>108</sup>

Section 23 refers to 'express provisions of the Code.' According to Hangar J, the word 'accident' is used as an antonym for the word 'implied.'<sup>109</sup> The Code therefore makes s 23 subject to other provisions of the Code, and describes these other provisions as 'express provisions relating to negligent acts and omissions.' As Gibbs pointed out, Griffith would have thought that the words of s 23 perfectly plain, but in fact, judges in a number of cases since have grappled with the question whether an act comprehended 'the external elements necessary to form a crime', or simply meant the physical action regardless of its consequences.<sup>110</sup>

## **2.4 Commentary on changes to s 23 Queensland Criminal Code**

An 'accident' in Queensland, for the purposes of the criminal law, was outlined in s 23(1)(b) of the Queensland Criminal Code.<sup>111</sup> However, it did not provide a formal definition of the meaning of an 'accident', which was demonstrated in a successful appeal on the basis a trial judge erroneously directed a jury that the word 'accident' was

---

<sup>107</sup> Sir Harry Gibbs, 'The Queensland Criminal Code: From Italy to Zanzibar' (Address at Opening of Exhibition Queensland Supreme Court Library, Brisbane, 19 July 2002).

<sup>108</sup> Bruce Boston, 'The New Italian Criminal Code [1889] *Law Quarterly Review* 287; Sir Samuel Griffiths, 'Criminal Responsibility: A Chapter from a Criminal Code' (Address to a meeting of the Australasian Association for the Advancement of Science, Sydney, 12 January 1898).

<sup>109</sup> *R v Young* [1969] Qd R 417, 424.

<sup>110</sup> Gibbs, above n 96; *Vallance v The Queen* (1961) HCA 42; *Kapronovski v The Queen* (1973) 133 CLR 209; *R v Van Den Bemd* (1994) 179 CLR 137.

<sup>111</sup> The section was amended, with effect from 4 April 2011, by s 4 of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

to be given its natural and ordinary meaning.<sup>112</sup> The Queensland Court of Appeal held such a direction was wrong in law.<sup>113</sup> Earlier, in *Kissier*, it was suggested that the use of the word ‘accident’ when directing a jury about s 23 (as it was then defined), may be confusing because it ‘is attractive to the lay mind to regard a result which is not actually intended as an accident.’<sup>114</sup> According to Connolly J, it was likely to confuse the word ‘accident’ and at the same time tell the jury that they may convict if the event was foreseen or reasonably foreseeable.<sup>115</sup>

Until it was amended in 2011, s 23(1)(b) applied to all persons charged with any criminal offence against the statute law of Queensland, and it provided that a person is not criminally responsible for an ‘event’ that occurs ‘by accident’:

[s 23] Intention – Motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for –
  - (a) an act or omission that occurs independently of the exercise of the person’s will; or
  - (b) an event that occurs by accident.
- (1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm.
- (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

In 2011 the section was amended by substituting for ‘an event that occurs by accident’:

- 23 (1)
- (b) an event that –

---

<sup>112</sup> *R v Wardle* [2011] QCA 339.

<sup>113</sup> *Ibid* 36.

<sup>114</sup> *Kissier* (1982) 7 A Crim R 171, 173 (Connolly J; Andrews SPJ and Thomas J concurring).

<sup>115</sup> *Ibid*.

- (i) the person does not intend or foresee as a possible consequence; and
- (ii) an ordinary person would not reasonably foresee as a possible consequence.<sup>116</sup>

The effect of the amendment is to reflect the common law test of accident in *R v Taiters*; *ex parte Attorney-General*, on the basis of which the learned trial judge directed the jury that Taiters should be acquitted as it was not open to them to be satisfied beyond reasonable doubt that an ordinary person in the position of the accused could have foreseen that death was a probable or likely consequence of his actions.<sup>117</sup> According to the Explanatory Notes, the reason for the change was an observation by the QLRC that the term ‘accident’ did not reflect the essence of the excuse and may create misunderstanding within the community.<sup>118</sup>

Under s 23(1)(b), the term had a different meaning (an unintended, unforeseen and unforeseeable event).<sup>119</sup> Where a death flows from an assault it is difficult for the community to understand how an accused may be acquitted on the basis the death was an ‘accident’. In essence, the Act omits the term ‘accident’ and legislatively enshrines the ‘reasonably foreseeable consequence’ test. Section 23 applies to all criminal offences against the statute law of Queensland,<sup>120</sup> and the protection afforded by this section is not dependent on whether the original act which caused the ‘event’ was lawful or unlawful.<sup>121</sup> For example, a person charged with causing grievous bodily harm can legitimately raise the excuse if the evidence supports it.<sup>122</sup>

#### **2.4.1 Comparison with United Kingdom and other jurisdictions**

In the United Kingdom however, the present law states that a defendant is guilty of unlawful act manslaughter if he or she kills by an *unlawful* or dangerous act. Therefore, the only *mens rea* required is an intention to do the unlawful act and any fault required

---

<sup>116</sup> The section was amended, with effect from 4 April 2011, by s 4 of the *Criminal Code and Other Legislation Amendment Act 2011*.

<sup>117</sup> *R v Taiters* [1997] 1 Qd R 333.

<sup>118</sup> Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2010 (Qld) 2.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Criminal Code 1899* (Qld) s 36.

<sup>121</sup> See *R v Martyr* [1962] Qd R 398; *R v Callaghan* [1942] St R Qd 40.

<sup>122</sup> *R v Joinbee* [2013] QCA 246.

to render it unlawful.<sup>123</sup> This is the same situation in Victoria,<sup>124</sup> and the other Australian common law States where it is irrelevant if the defendant is unaware that the act is unlawful or dangerous.<sup>125</sup> Therefore, s 23 as it applies in Queensland, would not be available to a defendant. However, homicide by misadventure is one of the forms of excusable homicide.

Archbold is reputed to have defined excusable homicide as ‘where a man doing a lawful act, without any intention of hurt, by accident kills another.’<sup>126</sup> This was demonstrated in a leading English case in which the defendant, having engaged in a frolic with a youth, reeled against a woman and knocked her down, killing her in the process. The defendant was subsequently charged with manslaughter. Justice Erle having discussed the doctrine of constructive manslaughter said:

Here, however, there was nothing unlawful in what the prisoner did to the lad and which led to the death of the woman. But as everything was done with consent, there was no assault and consequently no illegality. It is in the eye of the law an accident and nothing more.<sup>127</sup>

## **2.5 Meaning of ‘act’ and ‘event’**

An act, according to Oliver Wendell Holmes ‘is a willed muscular contraction, nothing more.’<sup>128</sup> Austin described an act as ‘a voluntary movement of my body, or, a movement which follows volition, is an act’,<sup>129</sup> and ‘bodily movements are the only objects to which the term “acts” can be applied with perfect precision and propriety’.<sup>130</sup>

---

<sup>123</sup> D C Ormerod, J C Smith & Brian Hogan, *Smith & Hogan’s Criminal Law*, (Oxford University Press, 13<sup>th</sup> ed., 2011) 540.

<sup>124</sup> *R v Besim* (2004) 148 A Crim R 28.

<sup>125</sup> *DPP v Newbury* [1977] AC 500.

<sup>126</sup> O.C.M. Davis, ‘Accidental Homicide’ (1938) 2 *Journal Criminal Law* 581, 583.

<sup>127</sup> *R v Bruce* CCC [1847] 2 Cox, 262.

<sup>128</sup> Oliver Wendell Holmes, *The Common Law*, (Little, Brown and Co, 1881) 73-74.

<sup>129</sup> John L. Austin, ‘Lectures on Jurisprudence or The Philosophy of Law’ in R. Campbell (ed) Two vols, 4<sup>th</sup> ed (John Murray, 1879) 145.

<sup>130</sup> *Ibid.*

Moore writes that some philosophers include both omissions and mental events in their definition of 'bodily movement'.<sup>131</sup> He quotes Donald Davidson who stated:

If we interpret the idea of a bodily movement generously, a case can be made for saying that all primitive actions are bodily movements. The generosity must be open-handed enough to encompass such "movements" as [the omission of] standing fast, and mental acts like deciding and computing.<sup>132</sup>

The term 'act' is not defined in the Queensland Criminal Code, and therefore is not confined to the immediate physical movement, nor does it extend to the consequences.<sup>133</sup> Nevertheless, the paragraphs of s 23(1) draw a distinction between an 'act or omission' and an 'event'. In *Murray*, it was held that the 'acts' in question must be regarded as a 'composite set of movements' that are to be 'taken as a whole'.<sup>134</sup> This is somewhat different to the Macquarie Dictionary definition of an act as: 'Anything done or performed; a doing; deed' or the Australian Oxford Dictionary which defines act as 'something done; a deed; an action'.<sup>135</sup> <sup>136</sup> Others have described the word 'act' as it appears in s 23 and s 13 of the Tasmanian Criminal Code as equivalent in meaning to the term 'external elements' of the offence in question.<sup>137</sup>

In *Vallance v The Queen*, Dixon CJ and Windeyer J gave the word 'act' a wide interpretation, meaning 'all acts of the accused forming the ingredients of the crime' or, to put it another way, the sequence of the conduct in which the act occurs.<sup>138</sup> In *R v Taiters*, the Court of Appeal held that the reference to 'act' is 'some physical action apart from its consequences', and the reference to 'event' in the context of occurring by accident, is a reference to the 'consequences of the act'.<sup>139</sup> Again, the word 'event' is not defined in the Queensland Criminal Code, and different interpretations have been

---

<sup>131</sup> Michael S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford University Press, 2010) 4.

<sup>132</sup> Donald Davidson, *Essays on Actions and Events* (Oxford University Press, 2001) 49.

<sup>133</sup> *R v Taiters* [1997] 1 Qd R 333.

<sup>134</sup> *Murray v The Queen* (2002) HCA 26.

<sup>135</sup> The Budget Macquarie Dictionary (The Macquarie Library, 3<sup>rd</sup> ed, 1998) 6.

<sup>136</sup> Bruce Moore (ed), *The Australian Oxford Dictionary* (Oxford University Press, 1999) 12.

<sup>137</sup> Colin Howard, *Australian Criminal Law* (Law Book Company, 4<sup>th</sup> ed, 1982) 343.

<sup>138</sup> *Vallance v The Queen* (1961) 108 CLR 56.

<sup>139</sup> *R v Taiters* [1997] 1 Qd R 333.

offered as to the meaning. In *Murray*, Kirby J suggested that, in the context of homicide, the word referred to ‘the entire occasion resulting in the death of the deceased’.<sup>140</sup> In the same decision, Gummow and Hayne JJ concluded that the ‘event’ was the death of the deceased.<sup>141</sup>

For the purposes of this thesis it is appropriate to adopt the narrower view, and to treat ‘the event’ in a charge of murder or manslaughter (for that is what is generally charged in one punch kill cases), as the death of the deceased. Furthermore, the Queensland Court of Appeal recently allowed a ground of appeal where the trial judge misdirected the jury by broadening the concept of ‘an event’ to mean any possible injury that would amount to the offence for which the accused was charged.<sup>142</sup> Currently, the law requires the finder of fact to consider whether the ‘event’ was a consequence that was not intended or foreseen by the defendant, and that an ordinary person in the defendant’s position would not have reasonably foreseen.

In *Kaporonovski v The Queen*, Gibbs J said:

It must now be regarded as settled that an event occurs by accident within the meaning of s23(1)(b) if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.<sup>143</sup>

According to Colvin & McKechnie, the original intention behind the statement in *Kaporonovski* was to deny any suggestion that a defence of accident could be available, merely because the event was not subjectively foreseen by the accused.<sup>144</sup> Gibbs J said that s 23 was elliptical, as it omits words needed to complete its grammatical construction or meaning and, when it speaks of criminal responsibility for an act or event, it does not mean that the act or event *per se* would necessarily give rise to

---

<sup>140</sup> *Murray v The Queen* (2002) HCA 26; *Murray v The Queen* (2002) 211 CLR 193, 208. See also *Kaporonovski v The Queen* (1973) 133 CLR 209; *R v Fitzgerald* [1999] QCA 109.

<sup>141</sup> *Murray v R* (2002) HCA 26; (2002) 211 CLR 193, 218-219.

<sup>142</sup> *R v Condon* [2010] QCA 117.

<sup>143</sup> *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231.

<sup>144</sup> Eric Colvin, and Justice John McKechnie, *Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworth, 6<sup>th</sup> ed, 2012) 73.

criminal responsibility. Rather, it refers to an act or event which is one of the circumstances alleged to render the accused person criminally responsible.<sup>145</sup>

This view was endorsed in *Duffy v R*, a Western Australian case with similar facts to *Kaporonovski*, where Wickham J said the consequences of an act alone could hardly give rise to criminal responsibility.<sup>146</sup> It also had the support of McTiernan J and Stephen J in *Kaporonovski*, and represents the view of Kitto and Menzies JJ in *Vallance v The Queen*, as well as the view of their Honours, together with that of Owen J, in *Timbu Kolian v The Queen*.<sup>147 148</sup> That is, the ‘act’ to which the first rule refers is a physical action, apart from its consequences. In *R v Taiters*, the Queensland Court of Appeal adopted the test provided by Gibbs J, but preferred it to be expressed in a positive way as follows:

The Crown is obliged to establish that the accused intended the event in question should occur or foresaw it as a possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.<sup>149</sup>

This statement raises the question, who is an ‘ordinary person’ and how far into the accused’s position must that person be placed? It was answered in *Taiters*, where the Queensland Court of Appeal said references to ‘reasonably’ and ‘ordinary person’ in the context under discussion give an emphasis to the fact that the relevant test calls for a practical approach, and is not concerned with ‘theoretical remote possibilities’.<sup>150</sup> Thus, in the case of a death, the killing will be excused if an ordinary person in the position of the accused would not have foreseen the death of the victim as a possible outcome or result of his or her deliberate act; for example, punching the victim in the head with a moderate blow.

There is little doubt that the community has difficulty reconciling an accident arising from a deliberate assault, especially where death results. As one respondent member to the QLRC review of the excuse of accident observed, ‘When a person deliberately

---

<sup>145</sup> *Kaporonovski v The Queen* (1973) 133 CLR 209.

<sup>146</sup> *Duffy v The Queen* [1981] WAR 72.

<sup>147</sup> *Vallance v The Queen* (1961) 108 CLR 56.

<sup>148</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47, 52-53.

<sup>149</sup> *R v Taiters* [1997] 1 Qd R 333, 338.

<sup>150</sup> *Ibid* 338.



assaults another, it is not a mishap by chance or an unfortunate happening. That it results in death is NOT an accident' (emphasis in original).<sup>151</sup> This concern appears to be recognised by the former Queensland Government, who subsequently passed a Bill omitting the term 'accident' from the relevant legislation, and legislatively enshrined the 'reasonably foreseeable consequence' test.<sup>152</sup> To date, there has been little comment about the change, probably because it does not change the essence of the excuse, although a QLRC Report earlier recommended there be no change to the excuse.<sup>153</sup>

Of course, the fact that the occurrence of an event as a consequence of an act, or a series of acts, might seem in hindsight to have been a real possibility, does not mean that an accused must always be taken as having foreseen it, or that an ordinary person in the same circumstances would reasonably have foreseen it. It is also not a presumption of law in Australia that a person intends the natural and probable consequences of his act.<sup>154</sup> Rather, the intention of a person criminally responsible for his act when committing that act, is an issue for the jury's determination as an inference from all evidence relevant to that issue. The basic question in a criminal trial must therefore be: what did the accused person do and is he or she criminally responsible for doing it? Of course, the burden of negating the existence of authority, justification or excuse, rests with the prosecution.<sup>155</sup> However, the defence must also raise evidence of an unintentional or unforeseeable act which could not reasonably be foreseen, on which a reasonable jury could act. Whether there is such evidence is a question of law.<sup>156</sup>

In 1995, the then Queensland Labor Government drafted major revisions to the *Criminal Code* in an apparent attempt to abrogate the decision of the Court of Appeal in *Van Den Bemd*.<sup>157</sup> In the Explanatory Notes to the Bill, it was argued that it was

---

<sup>151</sup> Submission 4 to Queensland Department of Justice and Attorney-General, above n 9, 148.

<sup>152</sup> Criminal Code and Other Legislation Amendment Bill 2010 (Qld).

<sup>153</sup> Queensland Law Reform Commission, above n 1.

<sup>154</sup> *Stapleton v The Queen* (1952) 86 CLR 358.

<sup>155</sup> *R v Mullen* [1938] St R Qd 97 where the Court of Criminal Appeal followed and applied *Woolmington v DPP* (1935) AC 462.

<sup>156</sup> In a criminal case the jury listens to the evidence and at the end of the case the trial judge directs them on the law to apply See, David Ross QC, *Ross on Crime* (5<sup>th</sup> ed LBC, 2011) 846.

<sup>157</sup> *Van Den Bemd* [1995] 1 Qd R 401.

artificial to consider a death which is caused by a deliberate blow as accidental.<sup>158</sup> Under clause 50 of the Bill, the law would be returned to that stated by the Court of Appeal in *R v Martyr* where the Court of Appeal ruled that if a person kills or injures another by a 'willed' blow with his fist, although the death or particular injury is not reasonably foreseeable, the death or injury is not an event which occurs by accident.<sup>159</sup>

<sup>160</sup> The Bill also included adding a 4<sup>th</sup> sub-section to s 23 [s 50 as drafted] which read:

24 The result intended to be caused by an act is immaterial to the person's responsibility, unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, completely or partly, by the act.

This amendment would have had the effect of eliminating 'accident' in cases of personal violence, however, the Government lost the election that year and the revised Code has never been enacted. It is surprising that this was not seriously considered by the QLRC in its review.

## 2.6 Taking your victim as you find them

As already stated in *R v Van Den Bemd*, the High Court reversed the decision in *R v Martyr*, ruling that accident does not include an existing physical condition, or an inherent weakness, or defect of a person such as an 'eggshell skull', or a possible inherent weakness in the brain.<sup>161</sup>

Van Den Bemd was convicted of murder following a bar fight in Toowoomba. Eyewitnesses saw Van Den Bemd strike the deceased twice in the face, however, a post-mortem examination revealed subcutaneous bruising within the neck muscles and that death was the result of a subarachnoid haemorrhage. At trial, defence counsel asked the trial judge to instruct the jury on accident, but the judge refused to do so, holding that s 23, as it then applied, had no application where the blow struck by the offender was a willed act, and the death was a direct result of it.<sup>162</sup>

---

<sup>158</sup> Criminal Code 1995 (Qld), 14.

<sup>159</sup> *R v Martyr* [1962] Qd R 398.

<sup>160</sup> *Ibid.*

<sup>161</sup> *R v Van Den Bemd* (1994) 179 CLR 137; *R v Martyr* [1962] Qd R 398.

<sup>162</sup> Section 23, as originally enacted stated: 23.Motive. Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

This ruling was consistent with *R v Martyr*, where the victim was killed by a blow to the chin.<sup>163</sup> This would not have caused serious damage to a normal person, but was fatal in this case because of some unusual weakness in the structure of the victim's skull.

*Martyr's* case was approved by the High Court in *Mamote-Kulang of Tamagot v The Queen* where it was held, that if on a charge of manslaughter it appears the death was the result of an immediate and direct result of an intentional blow, which would not have caused the death of a person of normal health, but unknown to the person striking the blow the victim had a constitutional defect which made him more susceptible to death than a normal person, the death is not 'an event that occurs by accident' within the meaning of the section (as it then was).<sup>164</sup>

### 2.6.1 'Accident' cases in disarray

In *Mamote-Kulang of Tamagot v The Queen*, the defendant was convicted of manslaughter of his wife who had died of a ruptured spleen after the defendant had struck her a hard blow in the abdomen with his fist.<sup>165</sup> It appeared that the victim's spleen was abnormally large and that, had it been of normal size, it probably would not have been ruptured by the defendant's blow. In *The Queen v Van Den Bemd*, the Queensland Court of Appeal considered *Martyr* and *Mamote-Kulang* and a number of other cases relating to 'accident'.<sup>166</sup> It found they were not easy to reconcile and the Court considered them in 'disarray'.<sup>167</sup>

However, *Kaporonovski v The Queen* was a decision of the High Court approximately 10 years after *Martyr* and *Mamote-Kulang*.<sup>168</sup> Kaporonovski was charged with grievous bodily harm after the victim, Bajric, insulted Kaporonovski. Kaporonovski became upset and struck Bajric. He took hold of the Bajric's wrist and pushed against Bajric's hand. Bajric, holding a glass of beer, pushed back with his hand. Kaporonovski pushed Bajric's hand back towards Bajric's face until the glass broke against Bajric's eye.

---

<sup>163</sup> Ibid.

<sup>164</sup> *Mamote-Kulang of Tamagot v The Queen* (1964) 111 CLR 62.

<sup>165</sup> Ibid.

<sup>166</sup> *R v Paul Anthony Van Den Bemd* [1992] QCA 236.

<sup>167</sup> *R v Van Den Bemd* [1995] 1 Qd R 401, 403.

<sup>168</sup> *Kaporonovski v The Queen* (1973) 133 CLR 209.

Bajric suffered a laceration and serious eye injury, amounting to grievous bodily harm, which Kaporonovski was subsequently convicted of. The trial judge had not instructed the jury on accident.

After his conviction, the trial judge stated a case for the Court of Appeal asking two questions: one about provocation and the other on accident.<sup>169</sup> The accident question was whether it was available on the evidence in this case. The Court of Criminal Appeal said it was not and Kaporonovski sought special leave to appeal from that decision to the High Court. The majority of the High Court in *Kaporonovski* held that for the purposes of s 23, the ‘act’ was pushing the glass into Bajric’s face, and the ‘event’ was the grievous bodily harm that ensued as a consequence. The Court of Appeal concluded that the test under s 23 was the foreseeability of the consequence as a matter of probability or likelihood.

In the face of the reasoning in *Kaporonovski*, *Martyr* was no longer of good authority. Van Den Bemd was re-tried and acquitted. Therefore, it is possible to say, that accident made the difference in this case. The effect of the decision in *Van Den Bemd* was reversed by an amendment to s 23 of the *Criminal Code* (Qld) which became operational on 1 July 1997.

Before this amendment, the section was reformatted by breaking the first and second limbs referred to above into separate numbered subsections.<sup>170 171</sup> The amendment appears as s 23(1A). Unfortunately, the effect of s 23(1A) upon s 23(1)(b) produces anomalous results as the QLRC has pointed out.<sup>172</sup> For example, assume the following:

- A throws a moderate punch that lands on B’s head;
- B dies;
- A did not intend to kill B. Nor did A foresee that death might result from the punch; and
- A knows nothing about B’s health.

Section 23 has the following effect upon the criminal responsibility of A for the harm caused by the punch:

---

<sup>169</sup> *Criminal Code Act 1899* (Qld) s 266B.

<sup>170</sup> *Criminal Law Amendment Act 1997* (Qld) s 10.

<sup>171</sup> See *Reprints Act 1992* (Qld).

<sup>172</sup> Queensland Law Reform Commission, above n 1, 33.

- If there is no suggestion that B died because of an inherent weakness, then A's criminal responsibility depends on whether B's death was reasonably foreseeable by an ordinary person.
- However, if B died because of an inherent weakness, then A is criminally responsible for B's death, regardless of whether B's death was reasonably foreseeable by an ordinary person.

Therefore, the test of A's criminal responsibility for the consequences of his punch depends upon the state of health of his victim. This is despite the fact that the victim's health can in many cases be impossible to foresee; for example, where a person causes a minor wound to a victim who is a haemophiliac.<sup>173</sup> If the victim is particularly vulnerable, then A may not rely upon the s 23 excuse. If the victim is not particularly vulnerable, then A may rely on the excuse. Whether A's reliance upon the excuse in fact results in an acquittal, is of course, a matter for a jury at trial. But the issue raised is whether there is any justifiable reason for imposing a stricter test of criminal responsibility for the same willed act because the victim had a particular hidden vulnerability.<sup>174</sup>

Although this amendment was made with the best of intentions, it is a good example of how changing the law can sometimes result in unintended and, in this case, anomalous consequences. However, it should be mentioned in passing that the question evenly divided the QLRC, with the chairperson's casting vote needed to ensure the amendment was retained.<sup>175</sup> Interestingly all members agreed that s 23(1A) was too widely framed and should be limited to unlawful acts. However, the Government of the time and all subsequent Queensland Governments have not implemented that recommendation.

By way of contrast, the Western Australian Government did amend its Criminal Code to reflect Queensland's s 23 (1A) provision but with one important difference.<sup>176</sup> Acting on the recommendation of the Law Reform Commission of Western Australia the

---

<sup>173</sup> This seemingly fanciful scenario occurred in *State v Frazier* [1936] 98 SW 2d 707 Mo.

<sup>174</sup> Queensland Law Reform Commission, above n 1, 34.

<sup>175</sup> Queensland Law Reform Commission, above n 1, 200.

<sup>176</sup> *Criminal Law Amendment (Homicide) Act 2008* (WA)

Government limited the provision in their Criminal Code to unlawful acts.<sup>177</sup> That means a person is not excused from criminal responsibility where death or injury is *directly* caused by the deliberate application of force in circumstances where the death or injury would not have occurred but for the presence of a defect, weakness or abnormality in the victim. The consequence of this amendment is that if a victim has an egg-shell skull the accused is not automatically deprived of the defence of accident although it does mean he or she will be confronted by a much higher evidentiary burden in order to achieve an acquittal on the basis of accident. In that situation the defence would rest on the argument that, taking into account the fact that the victim had an egg-shell skull, the application of force was such that death would not reasonably have been foreseen by an ordinary person.

In Queensland as well as Western Australia, the mere fact that one has caused the death of another does not make a person criminally responsible for that death. Section 291 of the *Criminal Code* (Qld) provides that it is only unlawful to kill any person where such a killing is not authorised, justified or excused by law. Section 23 of the *Criminal Code* (Qld) provides such an excuse.

## **2.7 Unforeseen events in other jurisdictions**

The common law jurisdictions in Australia (New South Wales, South Australia and Victoria) do not have specific accident defence provisions in their criminal law legislation, and requires *mens rea* and the absence of a defence. Thus, in crimes such as murder, where a subjective mental state is a necessary element, the ‘accidental’ nature of the harm will effectively mean that the required mental element cannot be established. In these situations, a finding of manslaughter is usually more appropriate, depending on the circumstances of the case.<sup>178</sup> Nevertheless, ‘accident’ is still recognised as a defence in the common law. For example, in *Griffiths v The Queen*<sup>179</sup>

---

<sup>177</sup> Western Australia Law Reform Commission, *Review of the Law of Homicide*, Final Report, Project No 97(2007) 155.

<sup>178</sup> D Lanham et al, *Criminal Laws in Australia* (The Federation Press, 2006) 4.

<sup>179</sup> *Griffiths v The Queen* [1994] 69 ALJR 77.

Brennan, Dawson and Gaudron JJ referred to *Woolmington v DPP*<sup>180</sup> where Lord Sankey said:

If the jury are either satisfied with (the accused person's) explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.<sup>181</sup>

Both cases referred to above were the result of a gun accidentally going off.

The Queensland, Western Australia and Tasmanian Criminal Codes do not have the common law focus on mental element to establish criminal responsibility, but do provide for various defences such as 'unforeseen events' in Queensland,<sup>182</sup> 'Accident' in Western Australia,<sup>183</sup> 'Chance' in Tasmania,<sup>184</sup> and 'Unwilled Act and accident' in the Northern Territory.<sup>185 186</sup> While the Commonwealth and the Australian Capital Territory also have Criminal Codes, these tend to reflect the common law structure of 'intention, recklessness, negligence, strict and absolute liability', and do not mention 'accident' as a defence at all.<sup>187</sup>

## **2.8 Manslaughter under Australian Common Law**

The common law offence of manslaughter covers all forms of culpable homicide that do not amount to murder, just as it does under the Criminal Codes. That is, a person who kills another, under such circumstances as not to constitute murder, is guilty of manslaughter.<sup>188</sup> Although the necessity for the creation of such an offence is rarely questioned, its definition has been criticised widely over the years. Lord Atkin, in *Andrews v Director of Public Prosecutions*, observed that: 'Of all crimes manslaughter

---

<sup>180</sup> *Woolmington v DPP* [1935] AC 462, 472.

<sup>181</sup> *Ibid* 80.

<sup>182</sup> *Criminal Code 1899* (Qld) s 23.

<sup>183</sup> *Criminal Code 1913* (WA) s 23B.

<sup>184</sup> *Criminal Code 1924* (Tas) s 13(1).

<sup>185</sup> *Criminal Code 1983* (NT) s 31.

<sup>186</sup> Queensland passed the Criminal Code in 1899, developed by Sir Samuel Griffith. This was followed by similar codes in WA (1913), Tas (1924) and NT (1983).

<sup>187</sup> Lanham et al, above n 164, 24.

<sup>188</sup> *Queensland Criminal Code 1899* s 303 (definition of manslaughter).

appears to afford most difficulties of definition',<sup>189</sup> and in more recent times the Court of Criminal Appeal has made the comment: 'There has never been a complete and satisfactory definition of manslaughter'.<sup>190</sup> The fundamental problem appears to be that no 'specific intent' is involved in manslaughter, so the intention to cause death or serious injury is not necessarily a requirement of liability. As one English judge rhetorically observed: 'How can there be a defence to a charge of manslaughter? Manslaughter requires no intent'?<sup>191</sup>

However, the common law does draw a distinction between voluntary and involuntary manslaughter.<sup>192</sup> The crime of murder may be reduced to voluntary manslaughter because of partial defences like provocation or diminished responsibility. Involuntary manslaughter is committed where there is a killing without the fault element for murder; for example, without an intention to kill or cause grievous bodily harm. Modern common law identifies two categories of involuntary manslaughter: manslaughter by gross negligence and manslaughter by an unlawful and dangerous act.

## **2.9 Manslaughter by criminal negligence**

Manslaughter by criminal negligence is committed where the act that caused death was done by the defendant consciously and voluntarily, without any intention of causing death or grievous bodily harm. Furthermore, the cause of death must also be in circumstances that involved such a great falling short of the standard of care that a reasonable person would have exercised, and that involved such a high risk that death or grievous bodily harm would follow, and that the doing of the act merits criminal punishment.<sup>193</sup>

In the Queensland Criminal Code criminal negligence is dealt with under s 289 of the Code:

**Duty of Persons in charge of dangerous things.**

---

<sup>189</sup> *Andrews v DPP* [1937] AC 576, 581.

<sup>190</sup> *R v Church* [1966] 1 QB 59, 70 (Edmund Davies J).

<sup>191</sup> *R v Lamb* [1967] 2 QB 981, 988.

<sup>192</sup> *R v Lavender* (2005) 222 CLR 67.

<sup>193</sup> *R v Nydam* [1977] VR 430.



It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person, by reason of any omission to perform that duty.

This provision operates to facilitate proof of guilt in circumstances where death or injury has occurred following criminal negligence. As one of the elements of the offence is negligence, accident is excluded. Therefore, it is doubtful prosecutors would consider charging a 'one punch' killer with an s 289 offence, and there are all sorts of logistical reasons why this would be so.<sup>194</sup>

## **2.10 Manslaughter by an unlawful and dangerous act**

In Australia, manslaughter by an unlawful and dangerous act applies where the circumstances are such that a reasonable person in the defendant's position would have realised that they were exposing another to an appreciable risk of *serious* injury. It is not sufficient that there was a risk of *some* harm resulting (emphasis added).<sup>195</sup> Similarly, an act that entails only tortious liability cannot be considered unlawful for the purpose of manslaughter as the unlawfulness of the act must bear a distinct character, in that it consists of a breach of the criminal law.<sup>196</sup>

In *Burns v The Queen*, the High Court held that supplying dangerous drugs to another person does not constitute an unlawful and dangerous act which could ground an offence of manslaughter.<sup>197</sup> The majority said that to supply drugs to another may be an unlawful act, but it is not in itself dangerous as any danger arises from ingesting what is supplied. Therefore, if an accused unlawfully strikes another with a moderate blow

---

<sup>194</sup> See for example, *R v Hodgetts and Jackson* [1990] 1 Qd R 456 where the majority held that s 23 had no application, and no defence was available under this section, to cases where criminal negligence was the gist of the offence alleged.

<sup>195</sup> *Wilson v The Queen* (1992) 174 CLR 313.

<sup>196</sup> *R v Holzer* [1968] VR 481, 482 (Smith J).

<sup>197</sup> *Burns v The Queen* (2012) 246 CLR 334.

intending only some injury then he or she may escape liability for manslaughter by an unlawful and dangerous act if a reasonable person would have foreseen the same result.

The test for dangerousness is an objective one. The prosecution, therefore, need not prove that the accused knew the act was dangerous.<sup>198</sup> In *R v Wills*, Fullagar J stated that it is inappropriate to attach to the reasonable person 'anything that is personal' to the accused.<sup>199</sup> Unlawful act manslaughter is in fact a 'constructive' form of manslaughter, that is, that kind of involuntary manslaughter which can be committed without gross negligence, the accused having been engaged in an illegality at the time when he or she accidentally killed. According to Williams, a crime is said to be constructive when it does not fall within the ordinary meaning of terms, but is only brought about by a strained interpretation or extension.<sup>200</sup> The very word 'constructive' may be said to be a condemnation.<sup>201</sup>

Unlawful act involuntary manslaughter has also been severely criticised in some jurisdictions in the United States of America.<sup>202</sup> In the *State of Maine v Robert Pray*, the Supreme Court pointed to the flaw in the concept that a person may be convicted of unlawful act-involuntary manslaughter even though the person's conduct does not create a perceptible risk of death.<sup>203</sup> Thus, a person is punished for the fortuitous result-the death - although the jury never has to determine whether the person was at fault with respect to the death. Therefore, according to the Court, the concept violated the important principle that a person's criminal liability for an act should be proportioned to his or her moral culpability for that act. The wrongdoer should be punished for the unlawful act, and for homicide, if he or she is at fault with respect to the death, but should not be punished for a fortuitous result merely because the act was unlawful.<sup>204</sup>

---

<sup>198</sup> *Coomer* (1989) 40 A Crim R 417; *Zikovic* (1985) 17 A Crim R 396; *R v Wills* [1983] VR 201; *R v McCallum* [1969] TAS SR 73.

<sup>199</sup> *R v Wills* [1983] VR 201, 214.

<sup>200</sup> Glanville Williams, 'Constructive Manslaughter' [1957] *Criminal Law Review*, 293.

<sup>201</sup> *Ibid.*

<sup>202</sup> Jerome Hall, *General Principles of Criminal Law*, (The Bobbs Merrill Company, 2<sup>nd</sup> ed, 1960) 258-260. Wayne R. LaFare and Austin Wakeman Scott, *Handbook on Criminal Law* (West Publishing Company, 1972) 602. Ian Wilner, 'Unintentional Homicide in the Commission of an Unlawful Act', (1939) 87, 7 *University of Pennsylvania Law Review*, 811.

<sup>203</sup> *State of Maine v Robert Pray* [1977] 378 A 2d 1322.

<sup>204</sup> *Ibid.*

It could be argued mere foresight of a possibility of some harm resulting from a criminal act should not ground liability for a ‘causing death’ offence, otherwise it extends liability for manslaughter far too widely. For example, it could result in a person who dropped a banana skin on the floor (littering being a criminal offence in some jurisdictions) being held criminally responsible for the death of a person who slipped on it, hit their head, and died, since it is possible to foresee some risk of injury through dropping litter of this type. In *Andrews*, Lord Atkin expressed the opinion that killing in the course of an unlawful act is not in itself criminal.<sup>205</sup> If it were otherwise, he said, ‘a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter’.<sup>206</sup>

Atkins’ view reflects the general practice to look at an accused’s act in a wide sense. That is, to say that the driving of a motor vehicle is a lawful act, rather than to look more closely and say that driving contrary to the provisions of the *Road Traffic Act 1930* (UK) is an unlawful act.<sup>207</sup> It is interesting to note however, that the test for what constitutes as ‘dangerousness’ in the context of unlawful act manslaughter is more onerous in the United Kingdom than it is in Australia. Since *R v Church*, the consideration of whether the unlawful act could be considered dangerous is that it must be such that any reasonable and sober person would inevitably realise they would subject the victim to the risk of ‘some physical harm’, albeit not ‘serious’ harm.<sup>208</sup> This was followed in *R v Newbury*, where the House of Lords held that it was unnecessary to prove whether the accused knew that the act was unlawful or dangerous, and that it was sufficient that dangerousness was established objectively by the application of the *Church* test.<sup>209</sup>

This can lead to what might seem as harsh results. For instance, in a recent English case, two men were charged with involuntary manslaughter on the basis that they had

---

<sup>205</sup> *Andrews v DPP* [1937] AC 576.

<sup>206</sup> *Ibid* 585.

<sup>207</sup> *Road Traffic Act 1930* (UK).

<sup>208</sup> *R v Church* [1966] 1 QB 59.

<sup>209</sup> *R v Newbury* [1977] AC 500.

committed an affray which caused the death of the victim.<sup>210</sup> This alleged affray arose out of a violent incident which occurred at a nightclub where the victim worked as a doorman. After lighting a cigarette inside the club, the defendants, two brothers, were asked to leave the club by the victim, which they did. Both defendants then returned and engaged in a fight with other members of the club's door staff. It was unclear whether the victim was subject to direct physical violence, but he made himself available to offer assistance to his colleagues. Immediately following the incident, the victim re-entered the club, where he collapsed and died a short time later. Unbeknown to the victim, he was at the time suffering from a renal artery aneurysm and the cause of his death was blood loss resulting from a rupture of the aneurism. The evidence suggested that a spontaneous or coincidental rupture of the artery was 'very unlikely' or 'highly unlikely' and for the purposes of the appeal, the court proceeded on the basis that the affray was the substantial cause of death.<sup>211</sup>

The trial judge halted the initial proceedings based on a consideration of whether the unlawful act committed by the defendants could be considered 'dangerous' in the way required by *Church*. He reached the conclusion that the jury could not be sure that any sober and reasonable person, having the knowledge that the defendants had during the incident, would inevitably realise that there was a risk that the victim, an apparently fit, 40-year-old experienced doorman, would suffer an increase in blood pressure leading to a fracture of an aneurism as a result of anything that occurred on that night.<sup>212</sup> It was obviously a different form of harm than, for example, the danger of being physically assaulted by the defendants and suffering injuries from a fall.

The judge's decision was overturned on appeal, where it was held that since *Church* and *Newbury*, it was irrelevant whether or not the defendant foresaw the specific harm that might arise from the unlawful acts committed, nor was it required that the 'reasonable bystander should foresee the precise form or "sort" of harm which the unlawful acts caused'.<sup>213</sup> What was required, was that a reasonable and sober person would recognise

---

<sup>210</sup> *R v JM and SM* [2012] EWCA Crim 2293.

<sup>211</sup> *Ibid* 7.

<sup>212</sup> *Ibid* 9.

<sup>213</sup> *Ibid* 20.

that the unlawful acts committed by the defendants would have ‘inevitably subjected the deceased to the risk of some harm resulting from them’.<sup>214</sup> As a number of scholars have observed, the requirement that a reasonable and sober person need only foresee the risk of ‘some’ physical harm means that a defendant may be liable despite only having a low level of culpability.<sup>215</sup> This seems unduly harsh and the Australian common law test, that the foreseeability of the risk of ‘serious’ injury is fairer and preferable in terms of culpability for manslaughter.<sup>216</sup>

## 2.11 Battery manslaughter

A third category, battery manslaughter, was abolished by the High Court in *Wilson v The Queen*.<sup>217</sup> Battery manslaughter occurred where a defendant intentionally and unlawfully applied force that resulted in death, if the force was applied with the intention of doing some physical harm of a minor nature; something less than grievous bodily harm, but not merely trivial or negligible.<sup>218</sup> The kinds of situations which can fall within this head of manslaughter are punches, slaps, and backhanders, which cause death when no one would reasonably have expected such a result. As Philp J said in the Queensland case of *Callaghan*, speaking of a situation where the accused (A) intentionally struck the victim (V) a moderate blow from which quite unexpectedly grievous bodily harm resulted:

That under these circumstances A should escape liability for the grievous bodily harm while being liable for assault is quite consistent with one’s notion of justice. Why then, should not the section(s 23) have a similar application when the accidental result of the blow, intended merely as a light blow, is death?<sup>219</sup>

---

<sup>214</sup> Ibid.

<sup>215</sup> Adam Jackson, ‘The Meaning of ‘Dangerousness’ in the Context of Constructive Manslaughter’ (2013) 77(1) *The Journal of Criminal Law* 7; Mitchell, above n 66, 537.

<sup>216</sup> *Wilson v The Queen* (1992) 174 CLR 313.

<sup>217</sup> Ibid.

<sup>218</sup> Stanley Yeo, *Fault in Homicide*, (Federation Press, 1997) 201.

<sup>219</sup> *R v Callaghan* [1942] St R Qd 40, 50.

As one commentator noted, a conviction for manslaughter in such situations seems unduly harsh and out of line with modern views of justice.<sup>220</sup> Furthermore, it could be said that the *mens rea* of assault in these circumstances has become the *mens rea* of manslaughter with the focus on the fatal consequences, not on the defendant's (D)'s action or intention. This was also the thinking of the High Court in *Wilson* where they determined battery manslaughter was unnecessary, as it carries with it the consequence that a person may be convicted of manslaughter for an act which was neither intended nor likely to cause death.<sup>221</sup> On the other hand, the minority in *Wilson* made the telling point that the one principle which stands higher than all others in criminal law, is the sanctity of human life.<sup>222</sup> In an earlier case the same judges cited as an accurate statement of the law, a passage from the judgment of Lord Parker in the Court of Appeal in *R v Creamer*:<sup>223</sup>

A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault, or, in the present case, abortion. This can no doubt be said to be illogical, since the culpability is the same, but nevertheless, it is an illogicality which runs through the whole of our law, both the common law and the statute law.<sup>224</sup>

Justification for this approach, which is not entirely convincing, has been offered by a Tasmanian court that this is 'not a matter of logic but of the policy of the law and is but another example that the life of the law has not been logic, but experience'.<sup>225</sup>

Similarly, in *Timbu-Kolian v The Queen*, Windeyer J discussed this aspect of manslaughter at length.<sup>226</sup> Referring to an earlier decision in *Mamote-Kulang* he stated:  
227

---

<sup>220</sup> John Willis, 'Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed' (1985) 9 No. 2 *Criminal Law Journal*, 109, 112.

<sup>221</sup> *Wilson v R* (1992) HCA 31.

<sup>222</sup> Brennan, Deane and Dawson JJ.

<sup>223</sup> *Giorgianni v The Queen* (1985) 156 CLR 47, 503.

<sup>224</sup> *R v Creamer* [1966] 1 QB 72, 82.

<sup>225</sup> *R v Rau* [1972] Tas SR 59, 65-66 (Burbury CJ).

<sup>226</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47.

<sup>227</sup> *Mamote-Kulang of Tamagot v The Queen* (1964) 111 CLR 62.

It has always been the law that if a man strikes another without his consent intending to hurt or harm him, although not to kill him, if death ensues as a result of the blow, the homicide is criminal. If the intention was to cause grievous bodily harm, it is murder; if some lesser harm or hurt was intended, it is manslaughter. This, for the time being at least, is the result of a long chapter in the history of our law.<sup>228</sup>

A good example of the illogicality Lord Parker refers to is the offence of dangerous driving. All jurisdictions have laws relating to dangerous driving, and the penalties increase where grievous bodily harm or death results.<sup>229</sup> This is despite the fact that the *mens rea* is the same, regardless of the result caused. Technically, where a driver causes a victim's death in circumstances that amount to manslaughter at common law or under the Codes, he or she should be convicted of manslaughter.<sup>230</sup>

It is pertinent to note that the statutory culpable driving offences have been created because juries have traditionally been viewed as reluctant to convict drivers of negligent manslaughter.<sup>231</sup> Perhaps this is a recognition that the stigma of a manslaughter conviction is too high a price to pay for an act of negligence by otherwise law-abiding citizens. However, it seems anomalous that the prosecutors can justify a finding that driving a car dangerously is insufficiently unlawful to warrant a manslaughter conviction, but the application of the most insignificant force to another that no one would ever recognise as dangerous attracts a charge of manslaughter.

This is essentially the approach of The Model Criminal Code Officers Committee, established by the Standing Committee of Australian Attorneys-General in its recommendations for a Model Criminal Code. In 1992, it made final recommendations on provisions dealing with general criminal responsibility, and in 1998 it released draft

---

<sup>228</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47, 68.

<sup>229</sup> For example, under the *Criminal Code 1899* (Qld) s 328A, dangerous operation of a vehicle is a misdemeanour punishable by a fine of 200 penalty units or to imprisonment for 3 years. Where the accused causes the death of or grievous bodily harm to another person, the offence becomes a crime and he or she is liable to imprisonment for 10 years with heavier penalties imposed where the accused was adversely affected by an intoxicating substance.

<sup>230</sup> Bronitt and McSherry, above n 58, 180.

<sup>231</sup> Model Criminal Code Officers Committee, above n 41, - 161. See also GJ Bennett and B Hogan, 'Criminal Law and Sentencing' in *All E.R. Annual Review* (The Law Journal, 1983)141: 'The name, causing death by reckless driving, does not carry with your ordinary jurymen the same stigma as manslaughter and, however irrational in point of law this may be, he is in fact prepared to convict of the statutory offence where he would not convict for the offence at common law'.

provisions for fatal offences.<sup>232</sup> It recommended that both constructive murder and manslaughter by a dangerous and unlawful act be abolished.<sup>233</sup> Significantly, the Committee saw no reason to reintroduce manslaughter by intentional infliction of mere harm, as it would effectively reduce a manslaughter conviction to a matter of chance.<sup>234</sup> That is, virtually any intentional blow, no matter how slight, potentially exposes a person to a manslaughter conviction, provided it is not trivial or negligible in character. As the Committee noted, this is harsh, unjust and contrary to axiomatic criminal law principles.<sup>235</sup> It also noted that where death results, but a lesser offence was intended, ‘the defendant can be prosecuted for the offence he or she intended to commit’.<sup>236</sup> It recommended a new offence, ‘dangerous conduct causing death’, for circumstances in which a defendant is negligent about causing death.<sup>237</sup> In such cases, the Model Criminal Code Officers Committee considered the person to be ‘morally culpable, but not for manslaughter’.<sup>238</sup>

However, the Committee’s recommendations have not been reflected in the statute books. The common law jurisdictions in Australia have, like England, retained unlawful and dangerous act manslaughter, while the Code states of Tasmania and the Northern Territory have created equivalent statutory offences. Queensland and Western Australian Codes have omitted the offence altogether.<sup>239</sup> In recent times, alternative offences other than murder or manslaughter have also been proposed and implemented in some other jurisdictions for fatal assaults, so they may be one answer to making sure those who engage in violence do not escape conviction through the excuse of accident.<sup>240</sup> However, the new offences, such as unlawful assault causing death, in

---

<sup>232</sup> Standing Committee of Attorneys-General Criminal Law Officers, ‘Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility’ (Report, December 1992) 63; Model Criminal Code Officers Committee, above n 41, 161.

<sup>233</sup> Model Criminal Code Officers Committee Criminal Law Officers, above n 41, 65, 149.

<sup>234</sup> Ibid 145.

<sup>235</sup> Ibid 145.

<sup>236</sup> Ibid 63.

<sup>237</sup> Ibid 155. See also, Model Criminal Code Officers Committee, above n 41, 1.11.

<sup>238</sup> Ibid 147.

<sup>239</sup> *Criminal Code 1924* (Tas) s 156(2)(c) and *Criminal Code 1983* (NT) s 159(1).

<sup>240</sup> Western Australia for example which introduced a Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12 which provides for a new offence of ‘unlawful assault causing death’ to specifically deal with ‘one-punch’ cases. Also, s161A Unlawful assault causing death *Criminal Code 1983* (NT);



effect resuscitate the old battery manslaughter offence. Although the new laws have been brought in to ostensibly recognise the danger and consequences of the ‘king hit’, the legislation is framed much more widely than that, and may capture people who lack the sort of culpability displayed by an offender who delivers a powerful punch. All that is required in Queensland is an assault to the head or neck and that the accused caused death, which means a person who commits a minor assault can be found just as guilty as the person charged with the more violent assault and is thereby exposed to a maximum penalty of life imprisonment.<sup>241</sup>

## 2.12 Is manslaughter the appropriate charge?

Manslaughter, by the infliction of some harm, would seem to demand a conviction in cases where D has assaulted V intending to hurt him or her and, where as a result of the assault, V has died, although the fatal consequence was not foreseen by D, nor could have reasonably been foreseen by an ordinary person. As noted previously, the focus is solely on the fatal consequences, not on D’s action or intention. So, if D is proved to have the *mens rea* of assault, and death accidentally or unexpectedly results, the *mens rea* or ‘guilty mind’ of manslaughter is attributed to him. Such an approach seems quite inconsistent with modern views of criminal justice. As Windeyer J said in *Timbu-Kolian*:

In general, criminal responsibility is today attached to moral blame. And according to deeply rooted beliefs blameworthiness does not depend simply on what a man did, or on the results his actions caused. It depends upon his knowledge and his intentions when he acted – or upon his inadvertence to the possible consequences of what he was doing or about to do, or his careless ignoring of them.<sup>242</sup>

It has been argued that manslaughter should be retained in cases, such as deterrence against street violence in particular. Indeed, the basis for this thesis arose from public concerns surrounding the prevalence of street brawls involving youth. The argument is, that the punishment for manslaughter serves as a powerful message to the community of

---

s25A Assault causing death *Amendment of Crimes Act 1900* (NSW); s302A Unlawful striking causing death *Criminal Code Act 1899* (Qld).

<sup>241</sup> Ibid.

<sup>242</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47 at 63.

the possible consequences of such behaviour. In passing, it should be noted that fighting *per se* is not an unlawful act.<sup>243</sup> In fact, in many jurisdictions fighting is only illegal in two out of three circumstances: if it is an ‘affray’ and if it occurs in a public place and can be viewed as a series of reciprocal assaults.<sup>244</sup> If a fight is a series of assaults, then at least the unlawfulness of a particular blow has to be shown.<sup>245</sup> This can often be problematical when sorting out the guilty in a street brawl. The statutory defences are also available in such circumstances.

To return to deterrence, as noted nearly 30 years ago, there is considerable doubt as to how effective conviction and punishment generally are in deterring serious criminal behaviour.<sup>246</sup> The only factor that has been shown to have even a marginal deterrent effect upon potential offenders is the likelihood of being caught.<sup>247</sup> This is especially true of brawlers, as judges not infrequently warn of the dangers of alcohol-fuelled violence. As the Chief Justice of Queensland noted: ‘The drink-sodden, prospective assailant is not going to pause to reflect on a judge’s advice’.<sup>248</sup> Of course, the converse proposition is that while the imposition of penalties for street fighting might not have deterred the offender before the court, they might have deterred other unknown, potential offenders because it is difficult to quantify those unknown potential offenders who do not commit an offence because of fear of punishment.

---

<sup>243</sup> In *R v Minor* [1992] 2 NTLR 183 Mildren J said: ‘An assault is not unlawful if authorised by the ‘victim’ unless the person committing the assault intends to kill or to cause grievous harm: *Criminal Code 1983* (NT) s 26(3).

<sup>244</sup> See affray in the Criminal Codes of Australia: *Criminal Code 1899* (Qld) s 72; *Criminal Code 1913* (WA) s 71; *Criminal Code 1924* (Tas) s 80; *Criminal Code 1983* (NT) s 69; also *Summary Offences Act 1979* (NT) s 47AA; *Crimes Act 1900* (NSW) s 93C.

<sup>245</sup> See for example, *I v DPP* [2002] 1 AC 285, 300 where Lord Hutton, in a judgment with which other Law Lords agreed, said: ‘a person should not be charged with the offence unless he uses or threatens unlawful violence towards another person actually present at the scene and his conduct is such as would cause fear to a notional bystander of reasonable firmness.’.

<sup>246</sup> Willis, above n 202, 120.

<sup>247</sup> Von Hirsh et al, above n 49, 36; Paul H. Robinson and John Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ [2004] *Oxford Journal Legal Studies* 173; S.A. Morrison, and I. O’Donell, ‘Armed Robbery: A Study in London’ (Occasional Paper 15, University of Oxford: Centre for Criminological Research, 9 November 1994) 178-182.

<sup>248</sup> Paul De Jersey, ‘A Fair Balance of Law’, *The Courier Mail* (Brisbane), 5 May 2007, 70.

## 2.13 The lack of foreseeability excuse in practice

But how does the excuse work in practice following a one-punch killing? A good starting place is the case referred to in the opening chapter, *R v Little*.<sup>249</sup> In order to understand the practical effects of the excuse as pleaded, it is necessary to repeat the facts. Jonathan Little was charged on indictment with the murder of David Stevens. Little was walking in a Brisbane Mall in the early hours of a Sunday morning, arguing with his girlfriend on his mobile phone when Stevens approached him. One witness said that Little and Stevens were pushing each other, another said that Stevens confronted Little, was 'in his face' and blocking his path. Little then punched Stevens knocking him to the ground. When Stevens was down, Little kicked him in the back of the head. Stevens was taken to hospital and put on life support until he died two or three days later from a subarachnoid haemorrhage that occurred as a consequence of a traumatic rupture of the left vertebral artery.

The post-mortem examination revealed that the deceased had had a very high blood alcohol concentration.<sup>250</sup> The medical evidence showed that it was more likely that the fatal blow was the punch, rather than the kick, which tore the over-stretched artery. On the medical evidence, the punch was thrown with moderate force causing only a bruise. In relation to the charge of murder, the defence argued that the prosecution had not proved beyond reasonable doubt that Little intended to kill Stevens or cause him grievous bodily harm. In relation to manslaughter, the defence argued that the prosecution could not negative or overcome accident. That is, that an ordinary person in Little's position could not reasonably have foreseen death as a consequence of a single moderate punch. During the trial the jury viewed a tape of Little's record of interview in which he expressed genuine surprise when the interviewing officer told him that

---

<sup>249</sup> The facts of this matter are taken from the Queensland Law Reform Commission's review of the excuse of accident.

<sup>250</sup> The deceased's blood alcohol concentration was 0.277 per cent. The pathologist called by the prosecution at trial gave evidence that this level of intoxication contributed to death: the rupture injury is associated with heavy intoxication.

Stevens was on life support and was not expected to live.<sup>251</sup> The jury were also directed on self-defence, provocation and intoxication.<sup>252</sup>

The jury returned a verdict of not guilty of murder or manslaughter. Because jury deliberations are confidential, it is not possible to determine with any certainty which defence raised influenced the jury's decision.<sup>253</sup> It could well be that, although Little's actions did not bring any credit upon himself, the jury may have observed that his victim voluntarily put himself in a dangerous situation, as most reasonable people would understand the risks involved in gratuitously taunting an obviously drunk and angry stranger on the street. Clearly it does not excuse or justify what ensued, but the victim could not fail to be aware that he was putting himself in very real danger of an assault at the very least, and any consequences that might follow. An indication of the apparent capriciousness of jury decisions can be gleaned from the fact that at Little's first trial, observers gained the impression that the jury was inclined to convict.<sup>254</sup> At the first trial 'accident' had not yet been raised by the defence at the time the trial was aborted because of juror misbehaviour.<sup>255</sup> What can be said is that the verdict (and two other similar cases) outraged the victim's family and the media, which led to the then Queensland Attorney-General requesting, the Department of Justice to carry out an audit on defences to homicide.<sup>256</sup>

## **2.14 Queensland Department of Justice and Attorney-General audit on Defences to Homicide: Accident and Provocation<sup>257</sup>**

The audit team reviewed 80 murder trials and 20 manslaughter trials occurring between July 2002 and March 2007, and found that in most cases in which a particular defence

---

<sup>251</sup> Actual footage of the police interview was played on ABC TV, above n 6, 13.

<sup>252</sup> This defence was based on a comment made by Little in his police interview in which he alleged that he had been hit by the deceased. The deceased had previous convictions for assault.

<sup>253</sup> *Jury Act 1995* (Qld).

<sup>254</sup> Interview with victim's sister ABC TV, above n 6.

<sup>255</sup> A court officer overheard a jury member on a train talking about the case on a phone to a friend saying that, "Yeah, I've just been to a murder trial and we're going to hang this guy from the gallows."

<sup>256</sup> ABC TV, above n 6; Watt, above n 9, 12; Queensland Department of Justice and Attorney-General, above n 9, 1.

<sup>257</sup> For the purposes of this thesis I shall only be referring to 'accident' and not provocation.

or excuse was raised, it was raised in conjunction with another excuse or defence. The audit also found that a defence or excuse could be raised in circumstances where it appears that it was not the major issue at the trial, for example where the major issue at the trial was the identity of the killer.<sup>258</sup>

#### **2.14.1 Use of ‘accident’ in murder trials in Queensland**

The audit found that of the 80 trials reviewed, accident was raised in eight of them. All of these cases involved either or both of the limbs of s 23. In 14 of these cases, other defences/excuses were also in issue. In only four of these cases, was accident the only excuse/defence left to be considered by the jury. The audit found that where s 23 was raised, either alone or in conjunction with other defences, six defendants were acquitted of murder. One of those acquitted of murder was convicted of manslaughter, which suggests that in that case, s 23, although raised, was not the significant issue in the case because s 23, if successful, leads to an acquittal. In the four cases in which accident was raised and the accused was acquitted, it appeared to the audit team that the only case in which the foreseeability of death assumed such significance, was *Little’s* case.<sup>259</sup> However, even in *Little’s* case, it is difficult to exclude the possibility that the jury may have acquitted on the basis of self-defence. This led the audit team to conclude that accident rarely appeared to be the crucial consideration in murder trials.<sup>260</sup>

#### **2.14.2 Use of ‘accident’ in Queensland manslaughter trials**

The audit found that accident arose more often in manslaughter trials. This is not surprising, because in a case of murder the prosecution is seeking to prove that the accused acted deliberately and with intent to kill or do grievous bodily harm, and the evidence going to prove intent rules out both limbs of s 23. Of the 20 trials reviewed, accident was raised in fourteen. In only four of these cases was s 23 the only defence left for the jury’s consideration. On these four occasions, two defendants were acquitted, and in both these cases, it did not appear accident was the deciding factor. In the remaining 10 cases in which accident was an issue, a number of other offences were raised and therefore no firm conclusions can be drawn as to the success or otherwise of the accident defence. This could suggest that there are no widespread injustices caused

---

<sup>258</sup> Queensland Department of Justice and Attorney-General, above n 9, 30.

<sup>259</sup> Queensland Department of Justice and Attorney-General, above n 9, 35.

<sup>260</sup> Ibid, 33.

by the operation of s 23, and that juries are reluctant to find in favour of an accused based on accident. It must also be appreciated that sometimes juries return ‘merciful’ verdicts, and these verdicts are generally accepted as a valid exercise of a jury’s function.<sup>261</sup>

## **2.15 The ‘One-Punch’ Killer in Other Jurisdictions**

Queensland, of course, is not the only jurisdiction where legislation has been enacted to deal with deaths which are an unforeseeable consequence of acts of violence. As I have detailed below, Canada, Germany and the Commonwealth of Australia, to name a few, all have their own legal responses to the problem of unlawful, negligent deaths.

### **2.15.1 Canada**

The Criminal Code of Canada defines murder as culpable homicide with specific intentions:

s 222

- (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
- (2) Homicide is culpable or not culpable.
- (3) Homicide that is not culpable is not an offence.
- (4) Culpable homicide is murder or manslaughter or infanticide.
- (5) A person commits culpable homicide when he causes the death of a human being,
  - (a) by means of an unlawful act;
  - (b) by criminal negligence;
  - (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
  - (d) by wilfully frightening that human being, in the case of a child or sick person.

Culpable homicide is elevated to murder when:

---

<sup>261</sup> *R v Kirkman* [1987] 44 SASR 591, 593.

- The person who causes the death of a human being means to cause his death, or means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;
- A person meant to cause the death of a human being or cause him bodily harm that he knows is likely to cause his death, and by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that person; or
- A person, for an unlawful objective, does anything he knows is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his objective without causing death or bodily harm to any human being.<sup>262</sup>

The ‘one punch’ killer in Canadian law would clearly be caught by s 222(5)(a) relating to unlawful act, and liable for manslaughter, but probably not for murder, as intent would be lacking. This was confirmed by the Canadian Supreme Court in *R v Creighton*, where the majority said the test for the *mens rea* of unlawful act manslaughter is objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory in the context of a dangerous act.<sup>263</sup> Foreseeability of the risk of death is not required which equates with the Australian common law definition of unlawful act manslaughter, where the circumstances are such that a reasonable person in the defendant’s position would have realised that they were exposing another to an appreciable risk of *serious injury*.<sup>264</sup> It is not sufficient that there was a risk of *some* harm resulting (emphasis added).<sup>265</sup>

Canadian law differs from s 23 of the *Queensland Criminal Code* where foreseeability of the actual result, that is death, is required, not the fact that the victim may be exposed to bodily harm. Interestingly, although in dissent, the Chief Justice of Canada in *Creighton*<sup>266</sup> noted that there is a persuasive argument to be made that, as a matter of statutory interpretation, unlawful act manslaughter requires objective foreseeability of

---

<sup>262</sup> *Criminal Code 1985* (Can) s 229.

<sup>263</sup> *R v Creighton* [1993] 3 SCR 3.

<sup>264</sup> *R v Creighton* [1993] 3 SCR 3 as per Justices L’Heureux-Dube, Gonthier, Cory and McLachlin.

<sup>265</sup> *Wilson v The Queen* (1992) 174 CLR 313.

<sup>266</sup> *R v Creighton* [1993] 3 SCR 3, 4 (Lamer CJ).

the risk of death. The appeal in *Creighton* was to determine whether the common law definition of unlawful act manslaughter contravened s 7 of the *Canadian Charter of Rights and Freedoms* which states that ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’.<sup>267</sup> The Court found that fundamental justice does not require absolute symmetry between moral fault and the prohibited consequences. Policy considerations support a test for the *mens rea* of manslaughter, based on foreseeability of the risk of bodily injury rather than death.<sup>268</sup> In this respect, the court was following the earlier case of *R v DeSousa*, where Sopinka J put it that ‘no principle of fundamental justice prevents Parliament from treating crimes with certain consequence as more serious than crimes which lack those consequences’.<sup>269</sup> As Lord Parker stated in *R v Creamer*: ‘this can no doubt be said to be illogical, since the culpability is the same, but nevertheless, it is an illogicality which runs through the whole of our law, both the common law and the statute law’.<sup>270</sup>

### 2.15.2 Germany

In Germany, deaths which are an unforeseeable consequence of an act of violence often fall under s 227 of the Criminal Code, which deals with *Körperverletzung mit Todesfolge*, or Bodily Injury resulting in Death. This offence is less serious than *Totschlag*, which is the German version of manslaughter.<sup>271</sup> Section 227 provides that if a person causes the death of another through the infliction of bodily injury (under ss 223 to 226 of the Code), then he or she will face a minimum of three years imprisonment. In more serious cases the perpetrator faces 1-10 years imprisonment.<sup>272</sup> Death must be the consequence of a physical injury. The offence is capable of being satisfied by neglect. That is, the basic crime must inherently pose a danger to life, which is the consequence of the fact of death.

---

<sup>267</sup> *R v Creighton* [1993] 3 SCR 3.

<sup>268</sup> *Ibid* 4.

<sup>269</sup> *R v DeSousa* [1992] 2 SCR 944, 966-67.

<sup>270</sup> *R v Creamer* [1966] 1 QB 72, 82.

<sup>271</sup> *German Criminal Code (1998)* s 212 provides that: ‘(1) Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years. (2) In especially serious cases imprisonment for life shall be imposed.’

<sup>272</sup> See s 227.



However, in at least one case, this requirement has been treated liberally.<sup>273</sup> The defendant was charged with first-degree murder based on the *actus reus* alternative of insidiousness of s 211 of the Criminal Code, but convicted of simple assault under s 223. The defendant had forced her four year old daughter to eat, as a punishment, a bowl of chocolate pudding to which the child had, in her mother's absence, added roughly 30g of salt, believing it was sugar. The defendant became angry about what her daughter had done and forced her, against the child's vociferous protests and shows of revulsion, to eat the whole bowl of chocolate pudding containing the 30g of salt, recognising and accepting that this would cause her daughter some kind of sickness, such as stomach upset. What the mother did not know was that eating an amount of 0.5 – 1g of salt per kilogram of body weight will usually have lethal consequences. The girl at that time weighed 15kg. Her condition immediately deteriorated at an alarming rate and within about an hour, on her arrival at hospital, the daughter had become comatose. Within 35 hours the child had died. The defendant received a suspended sentence of one year and two months imprisonment.

The prosecution, the defendant and the private prosecutor appealed. The German Federal Court of Justice dismissed the appeals of the defendant and the private prosecutor, but upheld the appeal by the prosecution in part; that the trial court had rightly refused to enter a conviction for s 227 for the lack of the required *mens rea*, but should have entered a conviction for administering poison or another noxious substance under s 224 of the Code. The Appeal Court revised the conviction and replaced s 223 by a conviction for s 224, in respect of which s 223 is a lesser included offence. The sentence remained unchanged.<sup>274</sup>

#### **a) Differences in approach between German & English criminal law**

This decision has been noted for the purposes of demonstrating the differences in approach taken by the German and English criminal law with regard to the degree of foresight necessary to turn a mere assault into what English law calls constructive

---

<sup>273</sup> Bundesgerichtshof – BGH, 4<sup>th</sup> Criminal Senate [German Federal Court of Justice], Case No. 4 StR 536/05, Judgment of 16 March 2006.

<sup>274</sup> Ibid.

manslaughter, and German law assault occasioning death.<sup>275</sup> As German author Michael Bohlander has noted, under English law, committing the basic offence of assault or battery with the necessary *mens rea* for that offence is enough; in respect of the consequence of death, foresight of *any* harm is sufficient; there is no need for the accused or a reasonable person to have foreseen a likelihood of death.<sup>276</sup> Whereas under German law, any liability for a more serious result than that intended has to be based on negligence and foresight of *that result*, not just any harm. That is, German law combines liability for the basic act with a negligence liability for the more serious result.<sup>277</sup>

Tröndle and Fisher state that s 227 comes into play when an accused aims a hefty punch at a person's face, causing them to fatally hit their head off a parked car.<sup>278</sup> Liability could also arise under s 227 where an accused injures a person, who later dies of a heart attack partly brought about by the injuries sustained, or where the accused breaks into a house at night and ties up the elderly resident and the victim dies as a consequence of the shock, fear and agitation.<sup>279</sup> If death is caused through the infliction of more serious forms of bodily injury, such as an assault with a dangerous weapon, the accused could be subject to a minimum term of 3 years imprisonment under s 227.

#### **b) Law Commissions consider German approach**

Introducing a new offence similar to s 227 of the German Criminal Code has been considered by several law reform commissions, including the QLRC. For instance, in its report the QLRC rejected a proposal to amend the Criminal Code by including a new offence of unlawful assault occasioning death.<sup>280</sup> On the other hand, the Irish Law Reform Commission proposed mirroring s227 of the German Criminal Code which would cover cases where death arose due to deliberate assaults, and also where it was

---

<sup>275</sup> Michael Bohlander, 'Homicide and Non-fatal Offences: *Mens Rea*' (2006) 70, (6) *The Journal of Criminal Law* 482.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

<sup>278</sup> See Herbert Tröndle, *Thomas Fischer: Strafgesetzbuch und Nebengesetze*, (Aufl., München 1999) 49.

<sup>279</sup> *Ibid.*

<sup>280</sup> Queensland Law Reform Commission, above n 1, 207.

caused by neglect. This offence, it proposed, would be lower down the homicide ladder than manslaughter in terms of culpability.<sup>281</sup>

The Western Australian Law Reform Commission (WALRC) also considered a new offence of assault occasioning death to which accident does not apply.<sup>282</sup> But in its report, *Review of the Law of Homicide*, published in September 2007, it did not see the need to change its Criminal Code.<sup>283</sup> However, this new offence was subsequently adopted by the Western Australian government and passed into law.<sup>284</sup> In the same year, a private member's Bill providing for a similar offence in Queensland was voted down.<sup>285</sup>

### **2.15.3 Commonwealth of Australia**

Commonwealth criminal law is contained in the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth). However, unlike the Codes created by the Queensland and Western Australian Parliaments, the Commonwealth laws are limited to matters over which the Commonwealth has legislative power.<sup>286</sup> For example, the general offence of stealing is provided for in s 391 of the Queensland Criminal Code and in s 371 of the Western Australia Criminal Code. However, s 131.1 of the Commonwealth Code is limited to theft of Commonwealth property, and the offences of murder and manslaughter are restricted to an Australian citizen or resident where the offence occurs outside Australia. The offence of murder requires an intention to cause death, or recklessness as to causing death.<sup>287</sup> The offence of manslaughter requires an intention that conduct will cause serious harm or recklessness as to a risk that conduct will cause serious harm.<sup>288</sup> One of the physical elements required for manslaughter is that the

---

<sup>281</sup> Ireland Law Reform Commission, 'Involuntary Manslaughter', (Consultation Paper No. 44-2007, 2007) 245.

<sup>282</sup> *Criminal Code 1913* (WA) s 281 Unlawful assault causing death.

<sup>283</sup> Western Australian Law Reform Commission, 'Review of the Law of Homicide', (Project No. 97, 2007) 91.

<sup>284</sup> *Ibid* 6.

<sup>285</sup> Criminal Code (Assault Causing Death) Amendment Bill 2007(Qld).

<sup>286</sup> See *O'Brien* [1981] WAR 305.

<sup>287</sup> *Criminal Code 1995* (Cth) s 115.1(1)(d).

<sup>288</sup> *Criminal Code 1995* (Cth) s 115.2 (1)(d)

defendant's conduct causes another person's death. Absolute liability applies to this element.<sup>289</sup> This enlivens the excuse provision contained in s 10.1 of the Criminal Code (Cth), as it provides an excuse, in certain circumstances, from criminal responsibility for an 'intervening conduct or event'.

#### **10.1 Intervening conduct or event**

A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

- (a) The physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
- (b) The person could not reasonably be expected to guard against the bringing about of that physical element.

This, on the face of it, is a very limited excuse and is much more tightly drawn than the other Australian Codes. It is interesting that the authors of the Commonwealth Model Criminal Code have a much more lenient approach to criminal liability.

The Model Criminal Code was drafted by a committee formed from the Standing Committee of Attorneys-General. The Committee has adopted a fault-based approach to homicide offences, recommending that the law of homicide should continue to distinguish between murder, where there is intention to cause death or recklessness as to death, and lesser unlawful homicide.<sup>290</sup> It also recommended that provision should be made for manslaughter, where there is an intention to cause serious harm, or recklessness as to a risk that serious harm will be caused.<sup>291</sup> This approach has been adopted in the Criminal Code (Cth).

The Model Criminal Code Officers Committee (MCCOC) has also recommended that both constructive murder and manslaughter by unlawful and dangerous act be abolished.<sup>292</sup> Consistent with its fault-based approach, it considered that truly accidental deaths should not be equated with murder or manslaughter.<sup>293</sup> It also noted that where

---

<sup>289</sup> *Criminal Code 1995* (Cth) s.115.2 (1)(b), (2).

<sup>290</sup> Model Criminal Code Officers Committee, above n 41, 161.

<sup>291</sup> *Ibid* ss 5.1.9, 5.1.10.

<sup>292</sup> *Ibid* 65, 149.

<sup>293</sup> *Ibid* 63, 145.

death results but a lesser offence was intended, ‘the defendant can be prosecuted for the offence he or she intended to commit’.<sup>294</sup> It recommended a new offence, ‘dangerous conduct causing death’, for circumstances in which a defendant is negligent in causing death.<sup>295</sup>

#### **5.1.11 Dangerous conduct causing death**

A person:

- (a) Whose conduct causes the death of another person; and
- (b) Who is negligent about causing the death of that or any other person by that conduct, is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

In such cases, the MCCOC considered the person to be ‘morally culpable, but not for manslaughter’.<sup>296</sup>

## **2.16 Alternative charges to manslaughter**

Notwithstanding the seemingly worldwide abhorrence of violence and in particular, drunken violence, there appears to be a trend towards favouring alternative charges to manslaughter where death results from opportunistic low-level violence. In 2011 in California an accused was sentenced to three years jail in California for fatally punching another man in 2009.<sup>297</sup> The verdict followed an earlier manslaughter trial which led to a hung jury. The jury did however, convict the accused of battery with great bodily injury in connection with the death for which he received one year less than the maximum four-year prison sentence. The Judge said he could not ignore the fact that the jurors could not come to an agreement on the manslaughter charge.<sup>298</sup> Interestingly, the victim’s family largely agreed with the verdict stating that although they wanted the accused to serve the maximum four years they still believed justice was served.<sup>299</sup>

---

<sup>294</sup> Ibid 63.

<sup>295</sup> Ibid 155.

<sup>296</sup> Ibid 147.

<sup>297</sup> Record Searchlight, redding.com ‘Schauman gets three-year prison sentence for fatal punch’ December 22, 2011.

<sup>298</sup> Ibid.

<sup>299</sup> Kerry Loring, ‘Sentencing in Club Ice Punching Death’ KRCR-TV, News Channel 7, December 22, 2011, <http://www.krcrtv.com>

In contrast, four State jurisdictions in Australia have, in recent years, enacted new legislation specifically to tighten the liability of ‘one punch’ killers, because of a perception offenders were not adequately punished by a manslaughter conviction.<sup>300</sup> However, the application of a new offence of assault occasioning death to which the excuse of accident does not apply got off to an inauspicious start in Western Australia. A teenager charged with the death of a 17-year-old was acquitted of murder and manslaughter, but convicted of unlawful assault causing death.<sup>301</sup> The father of the deceased said his family was disappointed with the verdict, as was the leader of the Western Australian version of the ‘One Punch Can Kill Campaign’.<sup>302</sup> Their disappointment turned to anger when the offender was sentenced to a suspended sentence of two years gaol, because the judge did not believe the teenager posed a risk to the community or was likely to reoffend.<sup>303</sup> An appeal against the sentence on the grounds of ‘manifest inadequacy’ was also dismissed.<sup>304</sup>

Incidentally, this sentence does not appear to be out of kilter with a recent case in New Zealand involving a 16-year-old boy who was charged with manslaughter after a 15-year-old died following a fight.<sup>305</sup> Medical evidence showed that an undiagnosed heart condition contributed to the boy’s death. The Crown withdrew the manslaughter charge and amended it with the lesser charge of assault with intent to injure, to which the accused pleaded guilty. Eventually, the accused was discharged without conviction.<sup>306</sup>

---

<sup>300</sup> *Criminal Code* 1913 (WA) s 281 Unlawful assault causing death; *Crimes Act 1900* (NSW) s 25A Assault causing death; *Criminal Code* 1983 (NT) s 161A unlawful assault causing Death; *Criminal Code* 1899 (Qld) s 302A unlawful striking causing death.

<sup>301</sup> *Western Australia v JWRL* (No 4) [2009] WASC 392.

<sup>302</sup> Todd Cardy, ‘Teen first guilty verdict under new ‘One Punch’ law’, *Perth Now* (online), 30 October 2009, <http://www.perthnow.com.au/search-results?q=teen%20first%20guilty%20verdict%20under%20new%20one%20punch%20law>.

<sup>303</sup> Todd Cardy, ‘Killer of Woodvale Teenager Steven Rowe avoids jail after self-defence plea accepted’, *Perth Now* (online), 11 December 2009, <http://www.perthnow.com.au/news/western-australia/killer-of-woodvale-teenager-steven-rowe-avoids-jail-after-self-defence-plea-accepted/story-e6frg13u-1225809535497>.

<sup>304</sup> *Western Australia v JWRL* [2010] WASC 179.

<sup>305</sup> Rob Kidd, ‘Schoolboy Death: Family’s frustration boils over’, *New Zealand Herald*, (online), 7 August 2014, [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11305332](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11305332).

<sup>306</sup> *Ibid.*

It must be noted that the QLRC did not recommend amending the *Criminal Code* (Qld) to create a new offence of unlawful assault occasioning death, principally because it considered manslaughter was the most appropriate charge in cases of assaults causing deaths.<sup>307</sup> Furthermore, in the United Kingdom a landmark ruling by a rare five-strong panel of the Court of Appeal in 2009, issued tougher sentencing guidelines for those convicted of a ‘one punch’ killing.<sup>308</sup> The Lord Chief Justice, Lord Judge made the declaration when he substantially increased the minimum gaol terms in three cases before him. It must be said however, these three cases involved considerably more violence than the traditional ‘one punch’ manslaughter case. Nevertheless, in delivering the court’s judgment, Lord Judge said that in future, specific attention must be given to the consequences of a defendant’s actions, and also to the ‘problem of gratuitous violence in city centres and in the streets’.<sup>309</sup>

## 2.17 Conclusion

While there appears to be unanimity in all jurisdictions that unlawful violence, even low-level violence, resulting in death is to be condemned, there are varying views of the methods that should be used to combat the problem. Some are of the view that more severe sentences will act as a deterrent to street thugs and a clearer acknowledgement of the community’s abhorrence of gratuitous violence.<sup>310</sup> Others believe the abolition of defences or excuses such as accident will tighten the net on offenders, reducing their chances of acquittal.<sup>311</sup> On the other hand, there is a legitimate concern that a charge of

---

<sup>307</sup> Queensland Law Reform Commission, above n 1, 204.

<sup>308</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693; Frances Gibb, ‘One-punch’ killers to get longer jail sentences’, *The Times*, (online) 19 December 2009, <http://www.thetimes.co.uk/tto/law/article2215352.ece>.

<sup>309</sup> As per Lord Judge in *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>310</sup> Neil Hunter, ‘Widow of one punch victim Spencer Freeman backs Echo campaign for tougher sentencing’, *The Northern Echo* (online), 10 November 2011, <http://www.thenorthernecho.co.uk/news/9354143.print/>; Philip Johnston, ‘The price of just one punch: Lewis Gill is jailed for four years for hitting Andrew Young, but would tougher sentencing remind violent men that a single blow can be fatal?’, *Telegraph* (online), 26 February 2014, <http://www.telegraph.co.uk/news/unews/law-and-order/10662826>

<sup>311</sup> Andrew Clennell, ‘Mandatory eight-year minimum for drunk punchers’, *The Daily Telegraph* (online), 20 January 2014, <http://www.dailylegaph.com.au/news/nsw/mandatory-eightyear-minimum-for-drunk-punchers/story-fni0cx12-1226806255812>

manslaughter is too serious a charge for what, in some cases, can be little more than an assault gone wrong, and there is scope to charge a lesser offence, such as assault causing bodily harm with death as an aggravating factor, to ensure the offender is more fairly labelled. Another argument is for the introduction of alternative offences to ensure that offenders do not escape censure for the taking of a life. In the alternative, there is the powerful argument that acquittals on the basis of ‘accident’ are so rare as to not warrant the changing of the present law for no significant gain.<sup>312</sup> What also should not be lost sight of is that, so far as possible, criminal offences should be structured so that there can be no conviction without fault. As Simester and Sullivan have argued, this can be achieved by including within every criminal offence some element that reflects culpability.<sup>313</sup> All these arguments have merit, however, as former Australian High Court Judge Justice Heydon has written: ‘Advocacy is at its most difficult when it is being submitted that the law should be changed. For the court an overriding concern is the concern to preserve, or increase coherence in the law’.<sup>314</sup>

This chapter has discussed criminality as it relates to unintentional and unforeseen acts, and the legislative responses over the years in various jurisdictions to the events that have arisen from unintentional acts. It has reviewed the cases that have influenced the judiciary and the legislature, and delved into the variety of charges that have been preferred against offenders accused of mainly violent behaviour that has led to the death of their victims. In the next chapter, this thesis will look at the theory of justification and excuse as it relates to unintentional and unforeseen events, and whether the excuse is still justified in twenty-first century criminal law where deliberate violence is involved.

---

<sup>312</sup> Russell Goldflam, ‘Back to the Future’ (2012) 53(3) *Balance Column, Journal of the Law Society Northern Territory* 8.

<sup>313</sup> Simester and Sullivan, above n 71, 8.

<sup>314</sup> J. Heydon, ‘Aspects of Forensic Rhetoric in the past 50 years’ in Justin T. Gleeson and Ruth C.A. Higgins (eds), *Rediscovering Rhetoric*, (Federation Press, 2008), 246.





### 3 JUSTIFICATION/EXCUSE

#### 3.1 Introduction to the theory of excuse in criminal law

The last chapter discussed criminality as it relates to unintentional and unforeseen acts, and the legislative responses over the years in various jurisdictions to the events that have arisen from unintentional acts, particularly those relating to ‘one punch’ killers.

This chapter will look at the theory of justification and excuse, and whether these two concepts have any relevance to those accused of unintentional serious violence which unexpectedly results in death.

Few concepts are as basic to the law as ‘justification’ and ‘excuse’. As Cicero writes in his *Laws*:

In fact there has never been a villain so brazen as not to deny that he had committed a crime, or else invent some story of just anger to excuse its commission, and seek justification for his crime in some natural principle of right. Now *if even the wicked dare to appeal to such principles, how jealously should they be guarded by the good!*<sup>315</sup>

A proper understanding of excuse theory, as with justification theory, begins with recognising that the criminal law should only stigmatise and punish a person if he or she deserves it.<sup>316</sup> From this, it follows that the law may excuse a person from the consequences of an objectively illegal act, only if the person does not deserve to be stigmatised and punished for performing it. Punishment, in the absence of moral blame, is morally objectionable.<sup>317</sup> One criminal law theorist describes it as ‘common sense’ by invoking the French proverb, ‘*tout comprendre c’est tout pardonner*’.<sup>318 319</sup> This

---

<sup>315</sup> Marcus Tullius Cicero, Chapter 2 in Clarence Morris (ed), *The Great Legal Philosophers: Selected Readings in Jurisprudence*, (University of Pennsylvania, 1959) 47.

<sup>316</sup> Eugene R. Milhizer, ‘Justification and Excuse: What They Were, What They Are, And What They Ought To Be’ (2004) 78 (3) *St Johns Law Review* 725, 846.

<sup>317</sup> Joshua Dressler, *Understanding Criminal Law* (Lexis Nexis, 6<sup>th</sup> ed, 2012) quoting Sanford Kadish, ‘Excusing Crime’ (1987) 75(1) *California Law Review* 257.

<sup>318</sup> Michael S. Moore, ‘Causation and the Excuses’ (1985) 73(4) *California Law Review* 1091, 1092.

<sup>319</sup> To understand is to forgive all. The proverb is usually taken to assume that one understands another’s behaviour when one knows the causes of that behaviour.

common sense urges that we should excuse whenever we come to know the cause of behaviour, and that to do so is the mark of a civilised society. Generally speaking, the excusing conditions of the criminal law are variations of the theme ‘I couldn’t help myself’ or ‘I didn’t mean to do it’.<sup>320</sup> In this respect, the excuse defences are known in most jurisdictions as necessity, duress, insanity and mistake of law.

Typical cases of necessity include those of a starving person who steals a loaf of bread, or the shipwrecked sailor who dislodges another person from the only life-sustaining plank at sea. If the excuse derives from intimidation exerted by another human being, the appropriate excuse is duress.<sup>321</sup> Therefore, if an accused only commits a crime because a gunman threatens to kill the person if he or she does not, the defence of duress would be available. The third type of case involves legal insanity.<sup>322</sup>

### **3.2 The Defence of Insanity**

Since 1843, the defence of insanity has been governed at common law by the *M’Naghten* Rules, according to which everyone is presumed to be sane.<sup>323</sup> To avoid criminal responsibility for a criminal act, it therefore must be shown that at the time of committing the act the accused was suffering from such a defect of reason, from disease of the mind, that they did not know the nature and quality of the act done, or if they did not know it, that they did not know what they were doing was wrong.<sup>324</sup> In essence, no one can be tried for a criminal offence unless he or she is mentally competent.

---

<sup>320</sup> George P. Fletcher, ‘The Individualization of Excusing Conditions’ (1973-74) 47 *Southern California Review*, 1269.

<sup>321</sup> In the Queensland *Criminal Code Act 1899* the defence is included in s 25 Extraordinary emergencies: ‘Subject to the express provisions of this Code relating to acts done upon compulsion or provocation in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably expect to act otherwise.’

<sup>322</sup> *Criminal Code Act 1899* (Qld) s 27 Insanity: ‘A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of the capacity to understand what the person is doing, or of capacity to control the person’s actions, or of capacity to know that the person ought not to do the act or make the omission’.

<sup>323</sup> *M’Naghten’s Case*. UKHL (1843) All ER Rep 229.

<sup>324</sup> Ibid.

Statutory provisions dealing with fitness to plead exist in all jurisdictions. Mistake of law is tightly defined because, as a general rule, ignorance of the law is not considered an excuse: *ignorantia juris nominem excusat*. For example, in *Olsen v Grain Sorghum Marketing Board: Ex parte Olsen*, the Queensland Court of Appeal held that the belief of the appellants that they were doing nothing unlawful (which belief was conceded to be wrong) was a mistake as to the law, which in itself is no defence to any criminal prosecution.<sup>325</sup>

These four excusing conditions are all forms of involuntariness. That is, the claim is not that there was no act at all, but were it not for the conditions of necessity, duress, insanity or ignorance of the law, the actor would not have broken the law. Therefore, his or her act seems to be attributable to circumstances rather than to character. The premise seems to be that if a violation of the law does not accurately reveal the actor's character, it is unjust to punish the actor for what he or she have done.<sup>326</sup> As Hart writes, in a case of excused conduct, one cannot determine the character of the offender, therefore it is unjust to punish excused offenders.<sup>327</sup> Furthermore, the practice of excusing offenders for their deeds is interwoven with a felt distinction between condemning the act and blaming the actor.<sup>328</sup> It is always actors who are excused, not acts. The act may be harmful, wrong and even illegal, but it might not tell us what kind of person the actor is. For instance, in cases of low level violence (the basis of this thesis), the perpetrator does not usually possess the character of a murderer, even though his or her act results in the death of the victim.

This was acknowledged by the Court of Appeal in *Mallet's* case, where the offender was originally sentenced to 18 months imprisonment on a manslaughter conviction for an accidental death resulting from a minor assault.<sup>329</sup> The Court acknowledged that if the deceased had not fallen to the ground and struck his head on the pavement, it was most unlikely that a court would have done more than bind the appellant over for

---

<sup>325</sup> *Olsen v Grain Sorghum Marketing Board: Ex parte Olsen* [1962] Qd R 580.

<sup>326</sup> H.L.A. Hart, *Punishment and Responsibility*, (Oxford University Press, 1968) 36-37.

<sup>327</sup> *Ibid.*

<sup>328</sup> This distinction is also explored in Fletcher, 'Fairness and Utility in Tort Theory', (1972) 85 *Harvard Law Review* 537, 558-60.

<sup>329</sup> *R v Mallet* [1971] 14 JP Supp 1.

common assault. After delving into the background of the matter and noting the offender had no previous convictions and possessed excellent character, the Court concluded that as he had spent time in custody and he and his neighbours now knew that manslaughter was an offence which deserved a prison sentence, as an act of mercy, it could suspend the sentence for two years.<sup>330</sup>

Antony Duff has explained an excuse as ‘an admission that I got it wrong; I acted as I should not have acted; my action was not guided by reasons that should have guided it’.<sup>331</sup> To get it wrong, as the person offering an excuse admits to having got it wrong, is to fail in the exercise of one’s rational deliberation and action; it is to operate within the realm of practical reason, but to do so deficiently. A more general description of excuse is offered by Hart, where he writes:

‘that the individual is not liable to punishment, if at the time of his doing what would otherwise be a punishable act, he was unconscious, mistaken about the physical consequences of his bodily movements, or the nature of the qualities of the thing or persons affected by them’.<sup>332</sup>

This description would seem to encapsulate the person who unlawfully assaults his victim, but did not have the intention to seriously injure them, nor had the foresight to realise their victim would die as a result of their bodily action. It would also seemingly describe the person who assaults another, unaware that their victim has a congenital weakness that leads to their death, which the accused could not have reasonably foreseen. Hart’s analysis is also reflected in the excuses noted above, namely, necessity, duress, insanity and mistake of law.

Successful pleas of duress can lead to acquittal, and in the case of homicide, in many jurisdictions provocation can lead to a conviction for manslaughter instead of murder.

<sup>333</sup> <sup>334</sup> Mental disease is catered for by the insanity defence, and mental abnormality by

---

<sup>330</sup> Ibid.

<sup>331</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, (Hart Publishing, 2007) 287.

<sup>332</sup> H.L.A. Hart, above n 303, 28.

<sup>333</sup> The defence of duress, or compulsion as it is sometimes termed, operates to excuse an accused from criminal responsibility where the accused has committed a certain offence under a threat of physical harm to himself or herself or to some other person should he or she refuse to comply with the threatener’s demand: See *R v Hurley* [1967] VR 526, 543 (Smith J); *R v Lawrence* [1980] 1

the doctrine of diminished responsibility.<sup>335</sup> Williams claims that an excuse either denies intent, recklessness or negligence on the part of the defendant, or affirms that he was not acting as a fully free and responsible agent.<sup>336</sup>

There is some divergence on the views of what delineates justification or excuse. For instance, in the Canadian case of *Perka v R*, Dickson J considered that necessity was in the nature of an excuse, resting on:

A realistic assessment of human weakness, recognising that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism overwhelmingly impel disobedience.<sup>337</sup>

However, the dissenting judge, Wilson J, analysed necessity as a justification. She considered that in some cases, it was appropriate to consider the actor's response to the situation as not a wrongful act at all because it was fully justified. Her Honour said the circumstances in which a legal violation was justified arose out of some other conflicting duty to act.<sup>338</sup>

All definitions of excuse however, depend, to some extent, as to the purpose of the criminal justice system. It is only by reference to this that it is possible to establish who is to be absolved from criminal liability. Therefore, it is timely to review the theories of excuse, briefly reviewing the three most common: Utilitarian, Choice and Character theory.

---

NSWLR 122; *R v Pakazoff* [1986] 43 SASR 99; *R v Darrington and McGauley* [1980] VR 353; *R v Dawson* [1978] VR 536; *Emery* (1978) 18 A Crim R 49.

<sup>334</sup> For example, s 304 *Queensland Criminal Code* 1899: 'When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes the death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only'.

<sup>335</sup> Diminished responsibility began as a plea in mitigation in Scottish Courts in the mid-eighteenth century as a way of dealing with "mental weakness" falling short of insanity and as a way of avoiding the death penalty. See G Gordon, *The Criminal Law of Scotland* (W. Green & Son Ltd., 2<sup>nd</sup> ed, 1978).

<sup>336</sup> Glanville Williams, 'The Theory of Excuses' [1982] *Criminal Law Review* 732,735.

<sup>337</sup> *Perka v The Queen* [1984] 2 SCR 232 (Dickson J, Charinard and Lamer JJ concurring).

<sup>338</sup> *Ibid* 279.

### 3.3 Utilitarian theories

A utilitarian approach to criminal justice requires the greatest good for the greatest number. The most famous exponent of this theory was Jeremy Bentham,<sup>339</sup> who regarded responsibility as a condition to be satisfied if the threat to punish, as described by the criminal law, was to have the maximum effect. He believed that punishment is only justifiable if it is profitable, that is, the pain it produces is outweighed by the crime it prevents. Therefore, according to the utilitarian theory, people who claim excuses like duress, self-defence or provocation would best be deterred by a system which did not recognise these defences. That is, people might take more precautions against making a mistake, or becoming involved in an accident, if punishment was inflicted without reference to the actor's state of mind when he acted.

There are two situations in which the imposition of criminal sanctions would fail to serve utilitarian aims. First, the individual might, as a result of infancy or insanity, be unamenable to logical persuasion. Second, even if he or she was so amenable, their circumstances might be such as to give them no choice to their course of action. As one commentator has pointed out, in these two situations, punishment would be pointless because others would not be deterred.<sup>340</sup> Hart also pointed out that a system run purely on utilitarian principles would punish defendants who would currently be excused.<sup>341</sup> Take, for example, the crime known as unlawful carnal knowledge. If a defendant has consensual sex with an underage person honestly and reasonably believing that person was above the age of consent, then applying the utilitarian theory, that person would be unable to argue that they should be excused, even if their knowledge was objectively reasonable. Strict liability is also irreconcilable with the basic principle that persons ought to be stigmatised and punished only if they deserved it. The law is debased when it is used as a means for chastising the blameless to advance extraneous ends.<sup>342</sup>

---

<sup>339</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation, Volumes One and Two*, (T. Payne & Son, 2<sup>nd</sup> ed.1823) Chap. IV p xxvi.

<sup>340</sup> Alec Buchanan, *Psychiatric Aspects of Justification, Excuse and Mitigation: The Jurisprudence of Mental Abnormality in Anglo-American Criminal Law* (Jessica Kingsley, 1999) 34.

<sup>341</sup> H.L.A. Hart, above n 303 43.

<sup>342</sup> Eugene R. Milhizer, 'Justification and Excuse: What They Were, What They Are, and What They Ought To Be, (2004) 78 (3) *St John's Law Review* 725, 883.

Therefore, it is hardly likely a theory of strict liability that excludes excuses like self-defence and accident, would find favour in contemporary society. In relation to this thesis, the utilitarian theory raises more questions than it answers. For instance, where two assailants, A and B, form the same intention and use the same amount of force when assaulting a victim, but A's victim dies and B's victim, through pure happenstance, suffers no more than bruises, is there any utility in punishing A more than B? It would seem B needs reform in controlling his or her aggression as much as A, because there seems to be no utility which justifies the disparity in punishment. After all, we are discussing a situation where the result is due to chance and not to a difference in intention, unless we support the view that results are all that matter in deciding culpability, and therefore punishment must always be more severe for the murderer than the attempted murderer.

### 3.4 Choice theory

Some claim that responsibility resides in the ability to choose, and that excuses are based generally on a lack of the ability to choose, or a lack of choice.<sup>343</sup> Blackstone described the basis of the theory in 1769 as that all excuses could be:

‘reduced to a single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has the choice either to do or avoid the act in question, being the only thing which renders human actions praiseworthy or culpable’.<sup>344</sup>

‘Free choice’, it is said, exists if the actor has the substantial capacity and fair opportunity to:

- (1) Understand the pertinent facts relating to his or her conduct;
- (2) Appreciate that his or her conduct violates society's morals or legal norms; and
- (3) Conform his or her conduct to the law.<sup>345</sup>

---

<sup>343</sup> Sanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* (Macmillan, 1987) 328.

<sup>344</sup> William Blackstone, *Commentaries on the Laws of England*, (Clarendon, Vol. 4, 1796) 21.

<sup>345</sup> Joshua Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Penal Code’ (1988) 19(3) *Rutgers Law Journal* (1988) 671,701.



Unless all three conditions for free choice are present, blame does not attach to the wrongdoer, as he lacks a critical attribute of personhood.

Hart derives excuse from what he argues is the nature of the criminal law itself. Criminal Law, he says, is a 'choosing system'. It specifies the harms and risks it wishes people to avoid. Furthermore, it gives people 'reasons' to avoid them by girding them with 'costs'. However, criminal law ultimately leaves it to people, 'to choose' what to do.<sup>346</sup> Accordingly, he says, an actor is, and ought to be, excused from criminal conduct that he does not 'really' choose.<sup>347</sup> This theory suggests that a person who kills another through an act of low-level violence could cogently argue that they did not choose to kill the victim, only to assault them. In most instances however, the law does not regard the failure to choose to kill as a defence to manslaughter as manslaughter is precisely the offence a person commits by killing, not through choice, but through negligence.

Hart expanded on his theory by arguing that individuals are only responsible for what they do when they have the capacity and opportunity to do otherwise.<sup>348</sup> He offered two justifications for this. Basing excuses on lack of choice maximised two competing priorities – individual freedom and crime prevention. The second, was that fairness and justice demanded some such arrangement, whatever utilitarian balance was being sought.<sup>349</sup> Hart's reference to opportunity suggests a lack of external constraint. That is, lack of either capacity or opportunity, according to his theory, is enough to excuse.

However, there are a number of qualifications in this argument. As one commentator has noted in relation to opportunity, what of someone who places himself in a situation where his opportunity to operate within the confines of the law, is limited or precluded?<sup>350</sup> Should he be treated in the same way as someone whose lack of opportunity arises through no fault of their own? The English Courts have held not. For example, when the defendant joined a gang which he knew might put pressure on him

---

<sup>346</sup> Hart, above n 303, 44.

<sup>347</sup> Ibid 45.

<sup>348</sup> Ibid 152.

<sup>349</sup> Ibid.

<sup>350</sup> Alec Buchanan, *Psychiatric Aspects of Justification, Excuse and Mitigation: The Jurisprudence of Mental Abnormality in Anglo-American Criminal Law*, (Jessica Kingsley, August 2000) 35.

to commit an offence, he was not able to use the defence of duress when he committed an offence as a result of that pressure.<sup>351</sup>

A second qualification concerns capacity. In the case of an unprovoked assault, could it be excused by the assailant's dislike of the victim? No. But what if the attack arose from a personality change following a blow to the head? This situation would be more likely to come within the excuse of automatism.<sup>352</sup> Therefore, the choice theorist has to distinguish a lack of capacity from an unwillingness to apply that capacity. Duff also makes the point that even if actions are excused, people still make choices to engage in those actions.<sup>353</sup> People under duress may choose to yield. Mentally ill defendants still choose to do some things and not others (although this, it could be said, is a result of their mental disorder). Angry or frustrated people choose to lash out at the source of their annoyance but this does not excuse their behaviour. Therefore, for the purposes of attributing responsibility, a distinction has to be made between choices which will be termed 'adequate' or 'proper', and those which will not. In some cases, a mentally disordered person may not be aware that a choice is possible. In this instance, one might claim that the person lacks the ability to make a choice.

### 3.5 Character theory

The third approach to excuse derives from the works of Hume.<sup>354</sup> According to Hume, a person who performs a wrongful act is blameworthy if, and only if, his or her conduct manifests bad character on their part. That is, if, and only if, his or her conduct reveals them to have a settled disposition to disregard the legitimate interests of others.<sup>355</sup> In this approach, a central position is given to the character of the actor, especially any durable personal characteristic, whether or not it is susceptible to the will. It follows, therefore, that a person who performs a wrongful act has an excuse if, *inter alia*:

---

<sup>351</sup> *R v Sharp* [1987] QB 853.

<sup>352</sup> The expression "automatism" is no more than a catch-phrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person: See *Watmore v Jenkins* [1962] 2 QB 572.

<sup>353</sup> Antony Duff, 'Choice, Character and Criminal Liability' (1993) 12(4) *Law and Philosophy* 345, 352.

<sup>354</sup> David Hume, *Philosophical Essays Concerning Human Understanding* (A. Miller, 1748) 154-156.

<sup>355</sup> David Hume, *An Enquiry Concerning Human Understanding*, (Henry Regnery Co., 1965) 100-102.

- (1) They made a reasonable and good faith mistake that is consistent with them being of good character;
- (2) They were compelled by pressures over which they had no control;
- (3) They too young to have developed a settled character;
- (4) They acted from insanity rather than any settled character on their part, or
- (5) Their conduct was out of character.<sup>356</sup>

For his part Fletcher has explained one version of the role of character as:

- (1) Punishing wrongful conduct is just only if punishment is measured by the desert of the offender,
- (2) The desert of the offender is gauged by their character, that is, the kind of person he or she is, and;
- (3) Therefore a judgment about character is essential to the just distribution of punishment.<sup>357</sup>

Excuses, in this sense, are recognised in those circumstances in which bad character cannot be inferred from the offender's wrongful acts. Fletcher succinctly puts the character theory as an excuse that 'precludes an inference from the act to the actor's character'.<sup>358</sup> For instance, criminal behaviour is excused by mental illness because the illness comes between the act and any judgment regarding character. Therefore, the law punishes intentional killing more severely than reckless killing, as the character which can be inferred from the act of intentional killing is more malign.<sup>359</sup> If incorporated into a system of criminal law, it would allow the court's assessment of a defendant's character and, in particular, the court's conclusion that the prohibited act did not reflect that character, to excuse.

The criminal law however, limits the circumstance under which personal characteristics can exculpate.<sup>360</sup> For instance, before the partial defence of provocation is allowed, the law requires not only that the defendant lost control, but also that a reasonable person

---

<sup>356</sup> Peter Westen, 'An Attitudinal Theory of Excuse' (2006) *Law and Philosophy* 25(3)289, 332.

<sup>357</sup> George Fletcher, *Rethinking Criminal Law*, (OUP USA, 2000) 800.

<sup>358</sup> *R v Sharp* [1987] QB 853.

<sup>359</sup> Michael D. Bayles, 'Character, purpose and criminal responsibility' [1982] *Law and Philosophy* 5, 20.

<sup>360</sup> Fletcher, above n 73, 513.

would have done the same. An objective standard is being added to a subjective one;<sup>361</sup> so too for s 23 of the Queensland Criminal Code concerning negligent acts and omissions, where the law requires the finder of fact to consider whether the ‘event’ was a consequence that was not intended or foreseen by the defendant, and that an ordinary person in the defendant’s position would not have reasonably foreseen.<sup>362</sup>

According to Fletcher, the law adopts the reasonable person standard because of a fear that if the choices which a defendant made can be explained in terms of his physical or psychological characteristics, the scope for attributing blame will reduce.<sup>363</sup> However, in general, the criminal law rejects the character theory when proffered as complete defences to wrongdoing. For example, it is not uncommon for those convicted of fraud to be persons of exemplary character but whom, in a moment of weakness, have stolen an amount of money from their employer. The fact that the person was of otherwise good character is usually taken into account in mitigation with a lesser sentence imposed than for a habitual offender.

In the United States of America, for instance, the Federal Sentencing Guidelines permit judges in certain cases to reduce the sentences of defendants whose impulsive conduct ‘represents a marked deviation from an otherwise law-abiding life’.<sup>364</sup> However, the fact that the wrongful conduct is an exceptional lapse of otherwise good character provides no basis in law for exculpating an actor altogether. As stated in Holmes’ influential definition: The law is ‘what the courts do in fact, and nothing more pretentious, are what I mean by the law’.<sup>365</sup>

Some theorists propose a more deterministic variant of the character theory, arguing that a person is not necessarily responsible for aspects of his character that cause him to do evil, because character can be greatly influenced by environmental and other forces

---

<sup>361</sup> Ibid.

<sup>362</sup> *Kaporonovski v The Queen* (1973) HCA 35.

<sup>363</sup> Fletcher, above n 354, 515.

<sup>364</sup> ‘Aberrant Behavior’, (18 United States Sentencing Commission Guidelines Manual, Appendix 5K2.20, 2004).

<sup>365</sup> Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1896) 10(8) *Harvard Law Review* 457.

beyond a person's control.<sup>366</sup> These theorists argue that a person is not necessarily responsible for aspects of his or her character that causes them to do evil, because character can be greatly influenced by environmental and other forces beyond a person's control. Furthermore, when a person acts in conformity with a malformed character derived from such forces, punishment is not deserved even if the actions were freely chosen. Criticism of this theory says that it discounts that a person may have freely chosen to expose themselves to harmful external forces.<sup>367</sup> More importantly, it ignores that a person can retain the capacity to exercise free will and choose not to do evil, even when this might be contrary to the culture from which they derive. Certainly, those who indulge in violence principally because they are intoxicated can choose not to get drunk, and thereby lessen the risk of becoming involved in criminal behaviour. This is notwithstanding the culture of binge drinking that has been identified in Australian youth in recent years, and is at the core of the message contained in the 'One Punch Can Kill' campaigns.<sup>368</sup>

### 3.6 Recent Theories of Excuse

Two more theories of excuses have recently been advanced by John Gardner and Claire Finkelstein. Gardner argues that excuses come into play only with respect to persons who possess the following features: (1) they are 'responsible', that is, they possess the capacity to 'reason intelligibly through to action';<sup>369</sup> (2) they violate the elements of criminal offences, including *mens rea*;<sup>370</sup> and (3) they do so under circumstances that Gardner classified as 'unjustified'.<sup>371</sup> Gardner thus excludes as excuses several defences that Hart and others include, for example, insanity, immaturity and automatism. He defends this on the ground that people with those conditions are incapable of reasoning

---

<sup>366</sup> See, for example: Peter Arnella, 'Convicting the morally blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39(6) *University California Law Review*, 1511, 1524-25.

<sup>367</sup> Eugene R. Milhizer, 'Justification and Excuse: What they were, What they are and What They Ought To Be' (2004) 8 (3) *St John's Law Review* 725, 847.

<sup>368</sup> Australian Medical Association, 'Youth Binge Drinking Culture Must End' (Media Release, 25 February 2008).

<sup>369</sup> John Gardner, 'The Gist of Excuses' (1998) 1 (2) *Buffalo Criminal Law Review* 575, 589.

<sup>370</sup> John Gardner, 'Justifications and Reasons' in Andrew Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford University Press, 1996) 120-121.

<sup>371</sup> *Ibid* 105, 119.

intelligibly, and therefore lack responsibility.<sup>372</sup> He also excludes accident, mistake of fact, and mistake of law regarding the elements of the offences, on the grounds that people in these types of situations lack *mens rea* and therefore, are not guilty of anything that he believes would call for ‘excuse’.<sup>373</sup> According to Gardner, the exculpatory defences that remain are ‘excuses’. Those that are full defences, he argues, consist of: duress, accident, mistake of fact and mistake of law. A responsible actor who commits an unjustified offence ought nonetheless to be excused says Gardner, if, given the social ‘role’ or ‘form of life’ the actor occupies, his or her subjective thinking in committing it is ‘reasonable’. That is, his or her subjective thinking manifests the ‘skills’ and ‘standards of character’ of ‘courage, carefulness, honesty, self-discipline, diligence humanity, good will and so forth’ that society rightfully expects of persons in this type of social role.<sup>374</sup> This definition would not seem to fit the subject of this thesis however, that is, the person who accidentally kills someone through an unlawful act of minor violence, because they would lack many of the characteristics Gardner claims are necessary to attract the excuse.

Finkelstein’s definition of ‘excuses’ is a function of her definition of ‘justification’.<sup>375</sup> An actor has a ‘true justification’ she writes, when the law regards the commission of the *actus reus* of an offence as a ‘commendable’ thing to do under the circumstances. For example, when an actor is faced with a choice of evils such that committing the *actus reus* produces ‘greater social good’ than foregoing it.<sup>376</sup> Thus, she argues, where several innocent persons are mortally threatened by a culpable and wrongful aggressor, a third party is truly justified in killing the aggressor, because given the choice between the death of the innocent persons and a culpable wrongful aggressor, the death of the aggressor is a positive social good.<sup>377</sup> According to Finkelstein, ‘excuses’ are the exculpatory defences that remain when committing the *actus reus* of an offence is not commendable, whether because committing the *actus reus* leaves social welfare in

---

<sup>372</sup> See Gardner, above n 345, ‘589.

<sup>373</sup> See Gardner, above n 346, ‘119-120.

<sup>374</sup> Ibid.

<sup>375</sup> Clare Finkelstein, ‘Excuses and Dispositions in Criminal Law’ (2003) 6(1) *Buffalo Criminal Law Review*, 316, 317.

<sup>376</sup> Ibid 346.

<sup>377</sup> Clare Finkelstein, ‘Self-Defence as a Rational Excuse’, (1996) 57(3) *University of Pittsburgh Law Review* 621, 642-643.

equilibrium, or because committing the *actus reus* actually reduces social welfare.<sup>378</sup> As an illustration. Finkelstein asks us to suppose an innocent actor's life is threatened by several wrongful, but morally innocent children. The law accords the innocent actor a defence in the event he chooses to kill the children. However, Finkelstein writes, the defence is best understood as an 'excuse' rather than a 'justification', because given the choice between the loss of one innocent life (the actor's), and several innocent lives (the children), the death of several is not a greater social good.<sup>379</sup>

Although Finkelstein appears to have nothing to say specifically about unintentional and unforeseen acts, as described in this thesis, her definition of 'excuse' would seem, in part, to fit. That is, because the *actus reus* of an assault causing death is not commendable, and it results in a reduction of social welfare through the death of an innocent person. Nevertheless, as Fletcher points out, the point of excusing conditions is not to gauge degrees of culpability, but to determine whether the actor's culpability falls below the threshold required for a fair conviction.<sup>380</sup>

### 3.7 Distinguishing Justification from Excuse

The concept of justification emerged early in English law. For example, the killing of felons resisting arrest was absolutely privileged as early as the twelfth or thirteenth century.<sup>381</sup> The same result was achieved by statute in 1293 for the killing of trespassers by parkers and foresters.<sup>382</sup> Homicide, in self-defence or by accident, tended to be treated differently with the jury rendering a special verdict that did not exonerate the defendant, but did entitle them to seek a pardon from the Crown. The pardon was frequently accompanied by the forfeiture of the defendant's goods. This practice was codified by the Statute of Gloucester in 1278.<sup>383</sup>

---

<sup>378</sup> Finkelstein, above n 351, 317, 351, 354.

<sup>379</sup> Ibid 330-332.

<sup>380</sup> George Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (1971) 119 (3) *University of Pennsylvania Law Review* 401, 434.

<sup>381</sup> Donald L. Horowitz, 'Justification and Excuse in the Program of the Criminal Law, (1986) 49(3) *Law and Contemporary Problems*, 109,112.

<sup>382</sup> Frederick Pollock and Frederick William Maitland, *History of English Law* (Cambridge University Press, 1923) 477-78.

<sup>383</sup> James Fitzjames Stephen, *History of the Criminal Law of England*, (MacMillan & Co., 1883) 36, 37.

Self-defence emerged as a justification only gradually over succeeding centuries, and it was confirmed by a statute in 1532, which exempted the defendant from the forfeiture of his goods in such cases.<sup>384</sup> Eventually, juries were permitted to render a verdict of ‘not guilty’, thus allowing it to join the category of fleeing felons and trespassers as justified homicide. However, a bad motive was a bar to the defence of justification.

In *Laws v State*,<sup>385</sup> for example, a Texas statute provided that it was justifiable homicide to kill a person burglarising one’s house at night. However, the defendant was convicted of murder for killing such a burglar despite the statute, because the jury was persuaded that the defendant’s primary motivation was malice. The court explained, ‘It is not the intention of the statute to justify murder. Such a construction of the statute would, to our minds, be unreasonable and exceedingly dangerous’.<sup>386</sup> What this means is that in self-defence cases, possibly the weakest of scenarios for justification, the law does not encourage the resulting death but merely tolerates it. Therefore, the courts are more inclined to consider any bad motives of the actor, and call into question the need to have injured the attacker.<sup>387</sup>

However, early on, justifications gave rise to acquittals, whereas excuses were just pleas for discretionary remission of punishment.<sup>388</sup> Even today, some criminal theorists argue excuses can be handled through the exercise of sentencing discretion.<sup>389</sup> The slow pace of the evolution of excuse reflects the early and persistent tendency of the English criminal law to focus heavily on harm done as the basis for punishment.<sup>390</sup> Blackstone distinguished between justification and excuse in his discussion of the law of homicide, dividing homicide into three kinds: justified, excused, and felonious. Felonious

---

<sup>384</sup> Stephen, *supra* note 194, 39-40.

<sup>385</sup> *Laws v State* [1988] 26 Texas Crim. 643, 10 SW 220.

<sup>386</sup> *Ibid* 655, 10 S.W. 221.

<sup>387</sup> Wayne LaFave and Austin Scott, *Handbook on Criminal Law 21* (West Publishing Company, 1972) 206.

<sup>388</sup> Horowitz, *supra* note 192.

<sup>389</sup> Eric Colvin, ‘Exculpatory Defences in Criminal Law’ (1990) 10 (3) *Oxford Journal of Legal Studies* 381, 384.

<sup>390</sup> Emilio S. Binavince, ‘The Ethical Foundation of Criminal Liability’ (1964) 33(1) *Fordham Law Review*, 1.



comprised those homicides that were neither justified nor excused.<sup>391</sup> Homicide, Blackstone argued, was justified if it was perpetrated because of ‘some unavoidable necessity, without any will, intention or desire, and without any inadvertence or negligence in the party killing and was therefore without any shadow of blame’.<sup>392</sup> Or to put it in stronger form, if the defendant has a good defence, his or her conduct is legal.

### 3.8 Justifiable and Excusable Homicide

According to Blackstone, justifiable and excusable homicide differed, in as much as the excuse reflected some slight degree of fault ‘so trivial that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment’. He provided two specific examples of excusable homicide: misadventure and ‘self-preservation’,<sup>393</sup> presuming that in all cases of accidental death the killer must have been at some fault. Consistent with his reasoning, excusing self-defence was accorded to a person who defensively killed another during a brawl or confrontation, rather than the justification of necessity, because ‘since in quarrels both parties may be, and usually are, in some fault. The law will not hold the survivor entirely guiltless’.<sup>394</sup> In any event, as stated previously, fighting is not an unlawful act. Before any participant in a fight can be held criminally responsible for the death of another participant, it must be shown that death was caused by some unlawful act on the part of the person charged. It is not enough to show that the accused was fighting with the deceased and that such fight caused the death of the deceased.<sup>395</sup>

Most criminal law theorists accept the explanation of J.L. Austin, who states that in justifying an action, ‘we accept responsibility but deny that it was bad’; in excusing ‘we admit that it was bad but don’t accept full, or even any responsibility’.<sup>396</sup> A justification speaks to the rightness of the act, an excuse to whether the actor is accountable for a

---

<sup>391</sup> Blackstone, above n 321, 177.

<sup>392</sup> Ibid 178.

<sup>393</sup> Ibid 182.

<sup>394</sup> Ibid 187.

<sup>395</sup> *Re A-G Reference (No 6 of 1980)* [1981 QB 715.

<sup>396</sup> John L. Austin, ‘A Plea for Excuses’ in H. Morris (ed) *Freedom and Responsibility* (Stanford University Press, 1961) 6.

concededly wrongful act.<sup>397</sup> One of England's leading criminal law casebooks distinguishes it this way: 'An act is justified when we positively approve of it. It is merely excused when we disapprove of it but think it is not right to treat it as a crime'.<sup>398</sup> For example, Greenwalt puts forward the scenario of a driver of a fire engine rushing to a fire exceeds the speed limit.<sup>399</sup> Undoubtedly, the speeding engine raises the risk of a traffic accident, but the risks of harm are greater if time is lost getting to the fire. Therefore, the driver's behaviour is not wrongful; it is justified as people expect other persons placed in the same situation will act similarly. On the other hand, a worker who is experiencing extreme distress at home and who, in a fit of uncontrollable rage, strikes a blameless fellow worker, is not justified in doing so, but his or her emotional state might constitute a total or partial excuse. The worker's act was wrong, they and others hope it will not be replicated; but they were not fully responsible and is less blameworthy than someone else who performs a similar act.<sup>400</sup>

As George Fletcher puts it, 'A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act'. To answer for one's actions is to act subjectively: I explain my actions in terms of my reasons for belief and for action, reasons which I know because they were mine. Excuse therefore, is necessarily more subjective because it always focuses on the particular actor, whereas justification generally does not. An intentional act is either justified or unjustified, irrespective of the actor's motives, character or capacity.<sup>401</sup> Duff describes it the following way:

to offer an excuse is to admit that I got it wrong: I acted as I should not have acted; my action was not guided by the reasons that should have guided it. Perhaps I failed at the time to give due weight to those reasons, or gave undue weight to countervailing reasons that should not have weighed with me so strongly (if at all); perhaps I simply failed to deliberate, rushing into action in the heat or panic of the moment; perhaps I failed to abide by the outcome of my deliberation. I admit, that is, that my action was

---

<sup>397</sup> Fletcher, above n 73, 759.

<sup>398</sup> John C. Smith and Brian Hogan, *Criminal Law* (Oxford University Press, 9th ed, 1999) 189.

<sup>399</sup> Kent Greenwalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 (8) *Columbia Law Review*, 1897, 1899.

<sup>400</sup> Ibid.

<sup>401</sup> Fletcher, above n 73, 759.

in one sense unreasonable: I did not have good enough reason to act as I did or to believe that I had good enough reason to act as I did.<sup>402</sup>

This scenario accurately describes the accused's actions in many instances of a single punch that leads to death. That is, the failure to think through the consequences while acting in the heat of the moment. Criminal law excuses mean only that the defendant should not be punished as the excuse denotes a lack of penalty, not non-blameworthiness.<sup>403</sup> In contrast, an accused who claims justification argues their action was done for good and sufficient reasons. However, one who offers an excuse does not claim their actions were reasonable; they admit they were unreasonable but were, in a sense, an unreasonable reasonableness because even a reasonable person might have acted in that unreasonable way in a particular situation. The reasonable person is not a saint since that is not what we normally demand of each other as citizens. Therefore, in the situation described, it could be argued the accused has an excuse, even though his or her unreasonable action did not show reasonableness, it did not show them in the relevant sense an unreasonable person. If I commit an offence that a reasonable person would not commit, I show myself to be unreasonable in a way that merits conviction and condemnation. But, if even a reasonable person might have committed such an offence in such a situation, my commission of it does not show me to be unreasonable.<sup>404</sup> On the other hand, as Duff argues, one whose beliefs and actions are by contrast, unreasonably unreasonable has no such excuse.<sup>405</sup> A reasonable person would not have formed the beliefs on which he or she acted, or given into the temptation or pressure to which they gave in. Therefore, they cannot answer for their actions in a way that shows a criminal conviction to be unjustified.

---

<sup>402</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007) 287.

<sup>403</sup> Mitchell N. Berman, 'Justification and Excuse, Law and Morality (2003) 53 (1) *Duke Law Journal* 1, 27.

<sup>404</sup> Fletcher, above n 73, 760.

<sup>405</sup> *Ibid* 296.

### 3.9 Special verdicts for excusing defences?

Several proponents of distinguishing between justifications and excuses have also proposed special verdicts for excusing defences (for example, ‘not guilty on account of excuse’).<sup>406</sup> Special verdicts are already standard for the insanity defence, however adopting special verdicts in order to signal the wrongfulness of conduct would involve major changes to how the law on defences operate, and is not worth pursuing further.

Finally, why does the distinction between justification and excuse matter? Fletcher argues that ‘the distinction between justification and excuse is of fundamental theoretical and practical value’ and that it is essential to ‘a rational criminal code’.<sup>407</sup> Austin has observed that ‘words are our tools, and, as a minimum we should use clean tools; we should know what we mean and what we do not, and we must forearm ourselves against the traps that language sets us’.<sup>408</sup> For example, it is not uncommon for one to hear a lawyer say something like ‘the justification of self-defence excuses a person who injures an attacker’. As Dressler has noted, the words ‘justification’ and ‘excuse’ are not interchangeable in the taxonomy of criminal law defences. A justification does not excuse conduct, and excuse does not justify conduct.<sup>409</sup>

### 3.10 Excuse relating to death caused by ‘one punch’

Typically, the excuse offered by an accused who has killed another through a single punch, is that they ‘did not mean to kill or even seriously injure their victim’. This would suggest a lack of *mens rea* for murder,<sup>410</sup> but not necessarily for manslaughter. Of course it is one thing to say that *mens rea* is an element of an offence; it is another thing to say precisely what the state of mind that is required is. It is the ‘beginning of

---

<sup>406</sup> See, for example, Paul H. Robinson, ‘Criminal Law Defenses: A Systematic Analysis’ (1982) 82(2) *Columbia Law Review* 199; Williams, above n 313, 741.

<sup>407</sup> George P. Fletcher, ‘The Right and Reasonable’ (1985) 98(5) *Harvard Law Review* 949, 955.

<sup>408</sup> John L. Austin, ‘A Plea for Excuses’ in H. Morris (ed) *Freedom and Responsibility* (Stanford University Press, 1961) 6, 19.

<sup>409</sup> Joshua Dressler, ‘Justifications and Excuses: A Brief Review Of The Concepts And The Literature’ (1987) 33(4) *The Wayne Law Review* 1155, 1161.

<sup>410</sup> The doctrine of *mens rea* does not apply under the Griffith Criminal Code. Chapter V prescribes the conditions of responsibility and provides certain exemptions from criminal responsibility.

wisdom', as Lord Hailsham of St Marylebone said in *R v Morgan*, 'to see that *mens rea* means a number of quite different things in relation to different crimes'.<sup>411</sup> For example, it may connote different states of mind in respect of the several external elements of the same crime.<sup>412</sup> If A strikes B and causes him bodily harm, A's moral blameworthiness may depend on whether A moved accidentally; or whether he was unaware that B or anybody else was there; or whether he did not mean to cause bodily harm. A's moral blameworthiness may depend on whether A moved accidentally, or whether he or she did mean to cause bodily harm and could not or did not foresee that he would cause bodily harm. Therefore, the particular mental states that apply to the several external elements of an offence must be distinguished, not only as a matter of legal analysis, but in order to maintain tolerable harmony between the criminal law and human experience.

Nevertheless, these actions would not qualify for the application of a justification defence without more, because there would be no justification for it. It could only be 'excused' as an accident, if the accused could not have foreseen the consequence of his or her act and nor could a reasonable person.<sup>413</sup> Manslaughter criminalises accidental consequences of one's acts, and to be blamed for an accident is supportable only on the basis that the accused knowingly ran the risk of that consequence without taking adequate precautions or, on the basis that some acts are inherently risky and should not be undertaken without adequate precautions.<sup>414</sup> This reflects public policy that injuring people is to be deplored, or at least regretted, even though the actor lacks *mens rea* or negligence as the case may be.<sup>415</sup> Certainly, Appeal Courts have often commented on the need to deter brawling by drunken young men because of the risk of serious injury and in some cases death.<sup>416</sup>

On the other hand, criminal responsibility is attached to moral blame. As Windeyer J said in *Timbu Kolian v The Queen*, blameworthiness does not depend simply on what a man did, or on the results his action caused. Rather, it depends upon his advertence to

---

<sup>411</sup> *R v Morgan* [1975] UKHL 3; (1976) AC 182, 213.

<sup>412</sup> See Justice Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523.

<sup>413</sup> As per *Queensland Criminal Code 1899* s 23.

<sup>414</sup> Alan W. Mewett, 'The Enigma of Manslaughter' (1992) 34(3) *The Criminal Law Quarterly* 362, 370.

<sup>415</sup> A principle that no person should legally perform an act that tends to injure the public.

<sup>416</sup> *R v Amituanai* (1995) 78 A Crim R 588; *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179.

the possible outcomes of what he was doing or was about to do, or his careless ignoring of them.<sup>417</sup> For example, the Queensland Criminal Code provides that an unforeseen event is never of itself punishable, and it is immaterial whether it arose out of the doing of an unlawful act or of a lawful act.<sup>418</sup> Nevertheless, a death caused by accident is an excuse and not a justification because causing an accident, however blamelessly, is never justified.

### 3.11 Can violence ever be excused?

The question really is: can the use of violence be excused if death accidentally results? As noted above, under the Queensland Criminal Code, it can.<sup>419</sup> By contrast, the common law offence of involuntary manslaughter based on an unlawful and dangerous act does not allow for the excuse, because the unlawful and dangerous act was considered to be sufficient fault to support a conviction for manslaughter.<sup>420</sup> Public disquiet over the excuse of an unintentional and unforeseen act that results in a fatality appears to be based on the death of the victim. In *R v Callaghan*, Philp J posed the question that if A intentionally strikes B with a light or moderate blow, but by accident, grievous bodily harm results, the blow would be considered not an incident which occurs by accident, but is a *result* which occurs by accident.<sup>421</sup> Under those circumstances, A escaping liability for the grievous bodily harm while being liable for assault, is quite consistent with notions of justice.

This proposition accords with the theory of excuse; that, in Austin's words, in excusing 'we admit that it (the action) was bad, but don't admit full, or even any, responsibility'.<sup>422</sup> In the case of 'one punch' resulting in an unexpected death, it may be just for the actor to accept some responsibility, but not full responsibility. That is, they would not be answerable for manslaughter, but for a lesser crime. This is

---

<sup>417</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47.

<sup>418</sup> *Criminal Code 1899* (Qld) s 23.

<sup>419</sup> The same is true of other Australian Criminal Codes, for example, *Criminal Code 1913* (WA) s 23B; *Criminal Code 1924* (Tas) s 13(1); *Criminal Code 1983* (NT) s 31.

<sup>420</sup> *Wilson v The Queen* (1992) 174 CLR 313.

<sup>421</sup> *R v Callaghan* [1942] St R Qd 40, 50-51.

<sup>422</sup> John L. Austin, 'A Plea for Excuses' in H. Morris (ed) *Freedom and Responsibility* (Stanford University Press, 1961) 1.

notwithstanding the telling point that the one principle which stands higher than all others in criminal law is the sanctity of human life.<sup>423</sup>

However, in law, the interests of justice must always take precedence over any other considerations, no matter how compelling, if public confidence is to be maintained. Furthermore, it is well recognised the aims of criminal law take into account many factors. For example, there is the need to prevent offences, the disablement of offenders, deterring potential offenders, retribution and the rehabilitation of offenders.<sup>424</sup> But, in relation to the type of offences that are the subject of this thesis, deterrence would seem to be irrelevant, because they are often in the class of crimes that are undeterrable, given that they are usually committed in the heat of the moment. This is especially relevant when intoxication is involved, which is often the case in pub or street brawls; the starting point of this thesis. Of course, public deterrence may deter others from committing a violent assault but because the effect of deterrence is largely immeasurable it is difficult to accurately state whether it has the desired result.

Medical research shows that a larger proportion of victims of violence are intoxicated at the time of injury, compared to victims of other types of trauma.<sup>425</sup> Furthermore, a major study has shown in almost 90 per cent of cases of so-called confrontational homicide, one or more parties had been drinking or had taken drugs.<sup>426</sup> Interestingly, the medical community also acknowledges the problem that this causes the criminal justice system, as there may be a significant mismatch between the intention of the individual causing the injury, the degree of physical injury itself and the consequent harm caused.<sup>427</sup>

This was certainly the case in *R v Little*, where the victim had a blood alcohol concentration of 0.277 per cent, which is nearly six times over the legal driving limit in

---

<sup>423</sup> *Wilson v The Queen* (1992) 174 CLR 313 (Brennan, Deane and Dawson JJ).

<sup>424</sup> See *Penalties & Sentences Act 1992*(Qld) s 9.

<sup>425</sup> Ingeborg Rossow, Kai Pernanen, and Jurgen Rehm, 'Accidents, Suicide and Violence', in Harald Klingemann Gerhard Gmel (eds) *Mapping the Social Consequences of Alcohol Consumption* (Springer, 2001) 101.

<sup>426</sup> Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1994) 68.

<sup>427</sup> David Ranson, 'Death from Minor Head Trauma and Alcohol' (2011) 18(3) *Journal of Law and Medicine* 453.

Queensland. This statement should not be taken as to ignore the well-known legal principle that one should take one's victim as one finds them, but simply to acknowledge that intoxication, especially among the young, is a live issue when one comes to consider crimes of violence and how they might be prevented.<sup>428</sup> In fact, tackling excessive intoxication among young people, it has been argued, is probably a more effective way of reducing drunken violence than changing the criminal law as it relates to unintentional and unforeseen events.<sup>429</sup>

### 3.12 Intoxication as an excuse

For the sake of completeness, some reference should be made as to the use of intoxication as an excuse, especially, as pointed out above, the large number of 'one punch' killings that arise where intoxication has played a major role. In almost all of these cases, the intoxication of the offender, the victim, or both, has been self-induced. Self-induced intoxication however, is not a defence to a criminal charge in any jurisdiction.<sup>430</sup> On the other hand, evidence of self-induced intoxication can, in some circumstances, exculpate. For instance, (a) as a basis for negating intention; (b) as a basis for negating voluntariness; or (c) as relevant to a matter of justification or excuse.<sup>431</sup>

According to Fairall, in all jurisdictions, evidence of intoxication (whether self-induced or not), may be relied upon in raising a reasonable doubt as to the existence of the intention specified in the definition of the crime charged.<sup>432</sup> Certainly s 28(3) of the *Criminal Code* (Qld) as it relates to intoxication is specific: 'When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention existed'.<sup>433</sup> In *Cutter v The Queen*, in addressing

---

<sup>428</sup> Queensland Law Reform Commission, above n 1, 166.

<sup>429</sup> Craig Jones et al 'Impact of Restricted Alcohol Availability on Alcohol-related violence in Newcastle' (New South Wales Bureau of Crime Statistics and Research, 2009) 4.

<sup>430</sup> *O'Connor* (1980) 146 CLR 64; *Kamipeli* [1975] 2 NZLR 610 (CA); *Viro* (1978) 141 CLR 88.

<sup>431</sup> Paul A Fairall, *Criminal Defences* (LexisNexis Butterworths 4<sup>th</sup> ed. 2005) 12.4.

<sup>432</sup> *Ibid* 12.5.

<sup>433</sup> *Queensland Criminal Code 1899* s 28.



s 28 Intoxication of the Criminal Code of Western Australia, Brennan CJ and Dawson J said: 'Intoxication is relevant to the question whether an accused had the relevant specific intent in fact whether or not it establishes that he had lost the capacity to form an intent'.<sup>434</sup>

There are, of course, many offences which do not require proof of an intention to cause a specific result, manslaughter being one, which of course does not assist the defendant in a 'one punch' killing, as it is generally manslaughter that is charged. As for voluntariness, while the Criminal Codes uphold the principle that a person is not criminally responsible for an involuntary act, self-induced intoxication is the exception to the rule.<sup>435</sup> That is, in cases where the offence charged does not require proof of an intention to cause a specific result, the defendant cannot rely on a plea of involuntariness.

Nevertheless, there has been some judicial dissent to the prevailing law. In *Snow*, the Tasmanian Court of Appeal ruled, that so far as the mental element under s 13(1) of the Code is concerned: 'intoxication is irrelevant unless it has caused disease of the mind within s 16'.<sup>436</sup> In dissent, Crawford J stated that evidence of self-induced intoxication might, in rare cases, be relevant to the question of whether the accused's acts were voluntary and intentional. His Honour gave as an example an intoxicated person who lost consciousness or his balance and fell while holding a glass. If another person was wounded by the glass, it would be necessary to direct the jury in terms of s 13 as to the requirement of voluntary and intentional act.<sup>437</sup>

*Duffy*, a decision from Western Australia, is a case in point.<sup>438</sup> The defendant was charged with unlawful wounding after swinging his arm into the defendant's face while holding a beer glass. The defendant's case was that he did not know he was holding a glass because of his level of intoxication. The trial judge held that it was not a defence

---

<sup>434</sup> *Cutter v The Queen* [1997] 71 ALJR 638, 641.

<sup>435</sup> *Criminal Code* (Qld) 1899 s 23; *Criminal Code* (WA) 1913 s 23; *Criminal Code* 1924 (Tas) s 13.

<sup>436</sup> *Snow* [1962] Tas SR 271, 297.

<sup>437</sup> *Ibid*.

<sup>438</sup> *Duffy v The Queen* [1981] WAR 72.

under s 23B that he did not know that he was holding a glass when he swung his arm, and the jury were told to disregard evidence of intoxication. He was subsequently convicted. On appeal, the conviction was quashed as the majority held that there was a defence available under s 23B.<sup>439</sup> The act of striking person's face with a fist not holding a glass was a fundamentally different act from that of striking such a blow with a fist holding a glass. If the accused did not know that he or she was holding a glass, then the act could properly be described as an act which occurred independently of the exercise of will. Therefore, evidence of intoxication, whether or not self-induced, was relevant to the defendant's state of knowledge.

### **3.13 Self-induced intoxication**

In *Kusu*, the Queensland Court of Appeal held that self-induced intoxication does not give rise to a defence to a charge which does not involve a specific intent, based on either s 23 or s 28.<sup>440</sup> In a spirited dissent, Macrossan J opined that drunken people, like others, have accidents, and they should not be deprived of a relevant defence under s 23, merely because the non-operation of the will was due to intoxication. Furthermore, His Honour made the telling point that an act, which the jury are disposed to regard as unwilling or accidental, may be more satisfactorily appraised if they are permitted to know the extent of any intoxication of the accused person, who performed the physical act in question.<sup>441</sup> This is fair comment, because in many instances of drunken violence, offenders have often attested that their level of intoxication was a major factor in their poor decision making and lack of awareness of the seriousness of their actions. Indeed, in some instances, the testimony shows that they have absolutely no memory of the events that led to their charge. Conversely, a person may be intoxicated, but the relevant accident may have happened in spite of their intoxication. For example, take the case of a motorist who is charged with wilful damage as a result of colliding with a signpost. The cause of the accident may have been poor lighting or sub-standard road works, which would have also affected a sober driver. Is the intoxicated driver to be deprived of the excuse of accident in such a scenario?

---

<sup>439</sup> *Criminal Code 1913* (WA) s 23.

<sup>440</sup> *Kusu* (1980) 4 A Crim R 72 (CCA Qld).

<sup>441</sup> *Ibid.*

Of course, as a matter of common sense, intoxicated persons are more likely to have accidents than those who are sober. For example, in *Ryan v The Queen*, where an attempt was made to tie up the victim with one hand while holding a shotgun in the other, evidence of intoxication would be relevant to the determination of accident.<sup>442</sup> Intoxication can also be irrelevant, in the sense that it may have no bearing on an accident occurring. As Sir Samuel Griffith said in *R v Corbett*: ‘If the discharging of the rifle which caused Gillespie’s death was a pure accident, the prisoner is not responsible, whether he was intoxicated or not’.<sup>443</sup>

It is, however, a matter of record that the decisions in *Snow* and *Kusu* have been upheld by their respective Court of Appeals on many occasions, therefore this point is not worth pursuing. Of course, evidence of intoxication may become relevant in terms of sentence although it is generally held that drunkenness is not a strong factor in mitigation however, it may be a relevant mitigating factor in the case of Aboriginal people.<sup>444 445</sup> Intoxication can also have other consequences, especially, as can be seen below, when prosecution authorities make their charging decisions.

### **3.14 Intoxication and s 23(1A) of the Queensland Criminal Code**

The factor of intoxication can work both ways. As stated previously, medical research shows that death is more likely to occur when the victim is intoxicated, so that even a moderate punch to the head of an intoxicated individual may have unforeseen consequences.<sup>446</sup> Therefore, according to one commentator, this may mean the defendant may be unable to rely on the unforeseeability excuse, as they would be caught by s 23(1A), which renders the defence unavailable where a defect, weakness or

---

<sup>442</sup> *Ryan v The Queen* (1967) 121 CLR 205.

<sup>443</sup> *R v Corbett* [1903] St R Qd 246.

<sup>444</sup> *Wicks* [1989] 3 WAR 372.

<sup>445</sup> *Rogers and Murray* (1989) 44 A Crim 301, 315.

<sup>446</sup> To identify just two such cases where the victims were intoxicated, *R v Little* [2007] QSC (unreported) & *R v Hung* [2012] QCA 341 and where the evidence was the fatal punch had been delivered with mild force.

abnormality causes the victim's death.<sup>447</sup> Section 23(1A) qualifies s 23(1)(b). It provides:

However, under subsection (1) (b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm.

Victims of trauma often suffer from what is known as a 'subarachnoid haemorrhage', a dangerous condition which can lead to strokes, seizures and death. The research, which seems to have been accepted by the courts, suggests a link between intoxication and increased vulnerability to these fatalities.<sup>448</sup> However, although Queensland courts have accepted that intoxicated people are more vulnerable to death from subarachnoid haemorrhages after being assaulted, the vulnerability does not appear to have been recognised in any case in the context of s 23(1A), to deny an excuse under the section where an intoxicated victim has died.

The meaning of 'defect, weakness or abnormality' in the context of s 23(1A) was considered by the Queensland Court of Appeal in *R v Steindl*.<sup>449</sup> Steindl was charged with doing grievous bodily harm, after he punched his neighbour in the face. An ophthalmologist who examined the neighbour found that a lens, inserted in an eye to repair a cataract, had moved during the assault. If left untreated, it could have led to bleeding, increased pressure in the eye and blindness.<sup>450</sup> Steindl's counsel argued that 'defect, weakness or abnormality' referred only to constitutional or natural defects, and should not be extended to cover artificial or foreign objects. However, the majority held that artificial objects inserted into a body would fall within the term 'defect, weakness or abnormality'.<sup>451</sup>

---

<sup>447</sup> Colleen Davis, 'Intoxicated Victims and the Accident Excuse under the Queensland Criminal Code' (2009) 16 (3) *James Cook University Law Review*, 42, 44.

<sup>448</sup> David Ranson, 'Death From Minor Head Trauma And Alcohol' (2011) 18(3) *Journal of Law & Medicine* 453.

<sup>449</sup> *R v Steindl* [2002] 2 Qd R 542.

<sup>450</sup> *Ibid* 545.

<sup>451</sup> *Ibid* 546.

According to Davis, the interpretation given to ‘defect, weakness or abnormality’ could arguably extend to temporary, alcohol-caused vulnerability to conditions such as subarachnoid haemorrhage.<sup>452</sup> This is fair comment, but it is salutary to note that although the subarachnoid haemorrhage diagnosis is not novel, the prosecuting authorities, at least in Queensland, have not sought to raise it within the context of s 23(1A) to overcome the excuse of a lack of foreseeability. This would suggest there are obstacles to classifying the condition as falling within the term ‘defect, weakness or abnormality’. In any event, should prosecutors successfully charge drunken ‘one punch’ killers under s 23(1A), it may be viewed as harsh on defendants, especially in the not infrequent cases when both parties are intoxicated and are taking part in a consensual fight. Although it would probably be welcomed by the victim’s family, it may not strike the appropriate balance between the culpability of the defendant on the one hand, and the desire for retribution on the other.

### **3.15 Intoxication**

This raises the question; can intoxication be used as a defence or excuse by the accused in the case of a ‘one punch’ killing, given that many of these incidents arise when both parties are intoxicated? That is, in the case of the accused; was the accused so intoxicated that their fatal act was not voluntarily willed? In general terms, an accused can only be considered criminally responsible where he or she performed the criminal act voluntarily, meaning that it was willed.<sup>453</sup> Section 23(1) of the Code sets out that a person is not criminally responsible for an act that occurs independently of the exercise of the person’s will. However, involuntary conduct can of course happen with persons, both sober and drunk.

Although, as a matter of common sense, intoxicated persons are more prone to accidents. O’Connor and Fairall note, in a case such as *Ryan v The Queen*, where an attempt was made to tie up the victim with one hand while holding a shotgun with the other, evidence of some degree of intoxication would be relevant to the assessment of

---

<sup>452</sup> Davis, above n 416, 59.

<sup>453</sup> *Criminal Code 1899* (Qld) s 23.

accident, as well as a defence that the trigger finger twitched voluntarily.<sup>454 455</sup> However, the case law in Queensland and other jurisdictions, holds that evidence of self-induced intoxication cannot provide a foundation for a plea of involuntariness.<sup>456</sup> As noted above in *R v Kusu*, the majority of the Supreme Court of Queensland held that intoxication was irrelevant to a consideration of s 23(1) of the Code.<sup>457</sup>

As previously noted, there was spirited dissent by Macrossan J, who observed that drunken people like others, have accidents, and they should not be deprived of a possible defence under s 23, merely because the non-operation of the will was due to intoxication. His Honour also made the general point that an act, which the jury are disposed to regard as unwilled or accidental, may be more satisfactorily appraised if they are permitted to know the extent of any intoxication of the accused, who performed the physical act in question. Similarly. Malcolm CJ in *Cameron* expressed sympathy for the view that intoxication should be relevant to assessing whether the conduct was voluntary, but accepted that the weight of authority supported the majority view in *Kusu*, and there was no place for s 23 to be employed in an intoxication case.<sup>458</sup>

### 3.16 Sentencing

Retribution is a key element in sentencing, based as it is on the idea of retaliation, neutralisation, and the crude notion of ‘pay back’. As one author has put it, retribution is, in a sense, ‘backward-looking’, because it focuses on the criminal act and the offender’s criminal responsibility.<sup>459</sup> That is, crime is a wrong, and because of its wrongness, justifies the infliction of sanctions and punishment upon the criminal. Waller and Williams have observed that, strictly speaking, the retributive theory of punishment requires that punishment be inflicted, even though it would serve no apparent useful purpose.<sup>460</sup> For example, there is a duty to punish assailants in

---

<sup>454</sup> Paul A. Fairall and Stanley Yeo, *Criminal Defences* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2005) 12.23.

<sup>455</sup> *Ryan v The Queen* (1967) 121 CLR 205.

<sup>456</sup> *R v Kusu* [1981] Qd R 136.

<sup>457</sup> *Ibid.*

<sup>458</sup> *Cameron* (1990) 47 A Crim R 397.

<sup>459</sup> Andreas Schloenhardt, *Queensland Criminal Law*, (Oxford University Press, 2008), 13.

<sup>460</sup> Peter Waller and Charles Williams, *Criminal Law*, (LexisNexis Butterworths, 10<sup>th</sup> ed, 2005) 16.

proportion to the amount of harm done, notwithstanding that often their intentions are the same; the only difference is the damage caused. That is, the amount of harm done should not be the sole factor involved, or else we would punish accidental deeds equally with intentional ones.

Nevertheless, the importance of retribution cannot be ignored, for, as the Australian Law Reform Commission's, *Same Crime, Same Time: Sentencing of Federal Offenders* report said: 'retribution is a fundamental purpose behind sentencing'.<sup>461</sup> This is also a concept that resonates with the public. However, although important, should it be the overriding consideration, as it would often seem to be in crimes of violence? Other aspects of sentencing, for example, general and special deterrence, rehabilitation and restorative justice should also be considered.<sup>462</sup> Although rehabilitation for 'one punch' killers would be marginal, in the sense that a confirmed petty thief may have much greater need of rehabilitation than a once-in-a-lifetime manslaughterer. According to Hart, the danger to the individual is that he or she will be punished, or treated, for what he or she is, or is believed to be, rather than for what he or she has done, which is of course, consonant with the character theory of excuse.<sup>463</sup>

### **3.17 The culpability of consensual fights**

There is also the issue of consent. Many violent incidents, which result in death, have eventuated from a consensual fist fight. In most common law jurisdictions the 'fight' is almost certain to be 'unlawful', and the assailants are exposed to conviction for assault, regardless of consent.<sup>464</sup> Defining consent is also problematic. In Canada, where the courts have been confronted with the problem of 'consensual fist fighting', the judges have often queried the value of the consents given. In *R v Jobidon*, the Ontario Court of

---

<sup>461</sup> Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders' (Report 103 2006), 133, 149-151.

<sup>462</sup> *Penalties & Sentences Act 1992* (Qld) s 9

<sup>463</sup> Henry M. Hart, 'The Aims of The Criminal Law', (1958) 23(3) *Law and Contemporary Problems*, 401, 407.

<sup>464</sup> *Re Attorney-General's Reference (No 6 of 1980)* [1981] 1 QB 715. In that case Lord Lane said: It is not in the public interest that people should try to cause, or should cause, each other bodily harm for no good reason. This means that most fights will be unlawful regardless of consent.

Appeal said: ‘the so-called consents to fights are often more apparent than real and are obtained in an atmosphere where reason, good sense and even sobriety are absent’.<sup>465</sup>

Nevertheless, it does raise the question as to whether the defendant in a so-called consensual fight that results in death, is less culpable than one who attacks his or her victim without consent, notwithstanding the unlawfulness of the fight. In Polk’s study, *When Men Kill*, ‘confrontational homicides’, which made up 22 per cent of all killings, typically emerged out of some exchange, often involving insults and sometimes non-verbal gestures.<sup>466</sup> Virtually all of the individuals engaging in this scenario were male, but there were four examples where this pattern involved women, as both offender and victim.<sup>467</sup> Polk points out that most of these homicides start from some quite trivial incident.<sup>468</sup> An example of this sort of scenario was played out in Queensland in *R v Moody*, where the deceased and the accused engaged in a fight following a dispute at a taxi cab rank.<sup>469</sup> The deceased and his friends confronted the accused and his friends over an allegation of queue-jumping, and a general melee ensued. The evidence was not clear as to who threw the first punch. Nevertheless, the evidence did reveal both the deceased and the accused were trading punches when a punch from the accused, following a karate-kick, broke the deceased’s nasal bridge and caused immediate unconsciousness. The deceased aspirated blood from the nasal injury and later died. At trial, the jury returned a verdict of not guilty of manslaughter. This was the second time the accused had been on trial for the offence as the first jury were unable to reach a verdict and discharged. According to the Queensland Department of Justice and Attorney-General’s audit team, self-defence was an ‘equally important issue’ for the excuse of accident in the jury’s determination.<sup>470</sup>

It is arguable that a suspended prison sentence or probation may be the just solution for a convicted manslaughterer on these types of occasions. Mitchell and Mackay detail an example of a lenient sentence, where a 21-year-old-woman was convicted of killing her

---

<sup>465</sup> *R v Jobidon* [1988] 45 CCC (3<sup>rd</sup>) 176, 184.

<sup>466</sup> Polk, above n 397, 45.

<sup>467</sup> *Ibid.*

<sup>468</sup> *Ibid* 61.

<sup>469</sup> *R v Moody* [2007] QSC (unreported)

<sup>470</sup> Queensland Department of Justice and Attorney-General, above n 9, 5.



29-year-old male partner during a domestic argument.<sup>471</sup> While questioning her about her movements during the day, he threw his plate of food on the floor and put his hand in her face. She was holding a knife and fork and instinctively pushed him away, stabbing him through the heart in the process. Only minimal force was used. The defendant was put on probation for two years, with the condition that she should attend a treatment course determined by a psychiatrist. As the authors point out, stabbing a person through the heart obviously suggests intent to cause serious injury, but the defendant's case was that the stabbing was not intended.<sup>472</sup> Although she was angry at being questioned by her partner, she surely ought to have been aware that she was holding her knife and fork when she pushed him away. Therefore, a prison sentence, albeit suspended, takes into account the public policy that people should be prohibited from trying to cause each other bodily harm for no good reason. A society which entrusts its juries with power to bring in a verdict of acquittal in cases of undoubted guilt, ought to be able to trust its judges to exercise the lesser discretion of leniency in sentencing.<sup>473</sup>

However, as Fletcher writes: 'the duty of the court to excuse goes beyond an expression of mercy or of discretionary compassion'.<sup>474</sup> Excusing fulfils a duty to blame only the blameworthy. Even if the allegedly excused act is wrongful – even though the offender has no right to engage in the act – the judge is not entitled to condemn the actor if the judge or an average member of the community would have done the same thing under the same circumstances.<sup>475</sup> In essence then, the excuse of relating to an unforeseeable and unintentional death caused by a single punch, can arguably have two results. It can lead to a complete acquittal, or it may be a merciful factor for the judiciary to consider when passing sentence.

---

<sup>471</sup> The case was referred to anonymously as part of an empirical study: Barry Mitchell and Ron D. Mackay, 'Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases' (2011) 31 (1) *Oxford Journal of Legal Studies* 165, 182.

<sup>472</sup> Ibid.

<sup>473</sup> Ibid 427.

<sup>474</sup> George P Fletcher, 'Rights and Excuses' [1984] *Criminal Justice Ethics Journal* 17, 26.

<sup>475</sup> Ibid.

### **3.18 Conclusion**

It is axiomatic that offenders who gratuitously perpetrate violence on another that results in an accidental event, namely serious injury or death, will not be able to rely on a defence of justification. Justification is where the law regards the commission of the offence as an understandable or even commendable thing to do, given the circumstances.

Excuse is a different story. It is the recognition of the fallibility of human beings, even those engaged in wrongful behaviour, and reflects the sense that people should not be held criminally responsible for events that are not intended, foreseen or reasonably foreseeable. It is important that the distinction between justification and excuse be maintained if we are to maintain a rational criminal system. In the terms of this thesis concerning one punch that results in death, it is clearly an excuse, not a justification, as causing a fatal accident by inadvertence or negligence can never be justified. However, it is arguably just for the accused in such circumstances to plead excuse by accepting some responsibility, but not full responsibility.

This chapter has looked at the theory of justification and excuse, and whether the two concepts have any relevance to those accused of unintentional serious violence which unexpectedly results in death. It is argued that, while justification for an unlawful, violent act is not applicable, the excuse that an event that a person does not intend or foresee as a possible consequence and one that an ordinary person would not reasonably foresee as a possible consequence, is still relevant in modern criminal law. If, however, the excuse is not successfully pleaded, the question then arises of whether it is fair to label an accused as a serious criminal, for what is often an accidental event, dependent on bad luck rather than intent. This is especially true where an act of minor violence that causes an unforeseen death means the accused faces two of the most serious crimes on the criminal ladder, namely murder or manslaughter. Therefore, in the next chapter I will explore more fully the concepts of luck, fair labelling and proportionality of label and sentence, for not only those guilty of fatal violence, but their victims.



## 4 *LUCK & FAIR LABELLING*

### 4.1 Introduction

Consider this scenario: Two young men of similar age and physical build attend a party. Both become involved in a minor scuffle with two similar opponents. Both young men throw a punch of the same force against the face of their respective opponents. One of their opponents staggers back from the impact of the blow suffering no more than a headache and injured pride. The other trips, falls, and hits his head on the ground, suffering a brain injury that causes his death. Both assailants are charged. The first is charged with assault *simpliciter*, which attracts a maximum sentence of three years gaol.<sup>476</sup> The other is charged with manslaughter, and faces a maximum sentence of life imprisonment.<sup>477</sup> Yet both were possessed with the same intent. Arguably, neither of them is more culpable than the other, nor are they more dangerous. Nevertheless, the assailant who caused death is subject to condemnation for the more heinous offence because of the unfortunate result. The difference between causing, and not causing death in such cases, is surely a matter of chance.

This chapter will discuss the question of whether it can be consistent with the demands of justice to allow ‘outcome luck’ to make such a dramatic difference to an offender’s criminal liability. The aim is to show:

- (i) Why the problem of ‘outcome luck’ in this context, is different from the problem of outcome luck in other contexts, such as criminal attempts, and, in other areas of the law such as torts law, where there is no compensation for blameworthy conduct that produces no damage; and,
- (ii) If it is appropriate to attach a heavier punishment to dangerous conduct if it causes death, and should the increase in severity be modest, or at least much more modest than the law presently

---

<sup>476</sup> *Criminal Code 1899(Qld)* s 335.

<sup>477</sup> Definition of “manslaughter” *Criminal Code 1899(Qld)* s 303.

provides.<sup>478</sup> As noted by Ashworth, the law ‘should censure people for wrongs, not misfortunes’.<sup>479</sup>

## 4.2 The Definition of Luck

As with the word ‘excuse’ discussed in the last chapter, it is salutary to define what ‘luck’ means. The Concise Oxford Dictionary describes luck as, among other things: ‘fortuitous events affecting one’s interests, supposed tendency of chance to bring a succession of unfavourable events’,<sup>480</sup> while the Macquarie Dictionary definition is ‘that which happens to a person, either good or bad, as if by chance in the course of events’.<sup>481</sup> Other definitions are ‘something that occurs as a matter of luck is something that occurs beyond one’s control’;<sup>482</sup> or ‘something that occurs as a matter of luck is something that occurs by chance, that is something that is such that there is or was some probability of its not occurring’.<sup>483</sup>

It can be said that the vicissitudes of life necessarily include an element of luck. We may be lucky enough to win the lottery, or we may not. Luck can also arise from the results of our actions. Whether we hit a six, miss the bus or hit the bullseye, all events involve a degree of luck; good or bad. However, as Morse writes ‘luck’ is a slippery concept.<sup>484</sup> Viewed simply from a causation standpoint, luck does not exist because all events can be explained by the conditions that cause them. On the other hand, he says, if one draws the distinction between events within our conscious control, and those that

---

<sup>478</sup> The label ‘outcome luck’ is defined in Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979) 24.

<sup>479</sup> Andrew Ashworth, ‘Taking the Consequences’ in S. Shute, J. Gardner and J. Horder (eds) *Action and Value in the Criminal Law* (Oxford University Press, 1993), 120.

<sup>480</sup> H W Fowler & F G Fowler, *The Concise Oxford Dictionary* (Clarendon Press, 5<sup>th</sup> ed 1964) 726.

<sup>481</sup> *The Budget Macquarie Dictionary* (Macquarie Library, 3<sup>rd</sup> ed 1998) 240.

<sup>482</sup> Michael J. Zimmerman, ‘Taking Luck seriously’ (2002) 99 (11) *The Journal of Philosophy* 553, 559.

<sup>483</sup> Nicholas Rescher, ‘Luck’ (1990) 64(3) *Proceedings and Addresses of the American Philosophical Association*, 5.

<sup>484</sup> Stephen J. Morse, ‘Reasons, Results and Criminal Responsibility’ Vol (2004) 2 *University of Illinois Law Review* 363, 380.

are not, practically speaking, matters of chance, both of which are fully caused, we do refer to the latter as matters of luck.<sup>485</sup>

### 4.3 Moral Luck

Morality also plays a part. The normative quality of labelling and punishing wrongdoing underscores the idea that the criminal law serves the function of enforcing morality.<sup>486</sup> What morality means, of course, is open to debate and the subject of another thesis. The question posed here is the dilemma of judging someone on the result of their actions which arise from an element of luck. We tend to judge people for what they actually do, or fail to do, not just for what they would have done if circumstances had been different. This dilemma, I believe necessitates some discussion of metaphysics, which is the philosophy of being and knowing.

Bernard Williams and Thomas Nagel begin their discussions in ‘Moral Luck’ by contrasting morality with luck.<sup>487</sup> According to Nagel, the term ‘moral luck’ describes a state of affairs ‘where a significant aspect of what someone does depends on factors beyond their control, yet we continue to treat them in that respect as an object of moral judgment’.<sup>488</sup> Nagel provides four categories for classifying moral luck.<sup>489</sup> The first is ‘*constitutive luck*’, which concerns the kind of person the agent is, and includes one’s inclinations, capacities and temperament. For example, if we blame someone for being cowardly or selfish, and the person acts on those traits over which they have no control by, say, failing to save a child from a burning building, then we have a case of constitutive luck.

The second category Nagel classifies is ‘*circumstantial luck*’, the kind of problems and situations one faces.<sup>490</sup> For example, Nagel considers Nazi collaborators in 1930’s

---

<sup>485</sup> Ibid.

<sup>486</sup> Bronitt and McSherry, above n 57, 54.

<sup>487</sup> Nagel, above n 446, ‘24; Bernard Williams ‘*Moral Luck*’ (Cambridge University Press, 1981) 115.

<sup>488</sup> Ibid 59.

<sup>489</sup> Ibid 60.

<sup>490</sup> Ibid 65.

Germany who were condemned for committing morally atrocious acts, even though their very presence in Nazi Germany was due to factors beyond their control.<sup>491</sup> Had those very people been transferred by the companies for which they worked to say, Argentina in 1929, perhaps they would have led exemplary lives. The other two categories have to do with *causes and effects* of actions: luck in how one is determined by antecedent circumstances, and luck in the way one's actions and projects turn out, that is, outcome luck. This is the relevant part of the philosophy which concerns my thesis.

Immanuel Kant believed that good or bad luck should influence neither our moral judgment of a person and his or her actions, nor his or her moral assessment of themselves.<sup>492</sup> Therefore, Kantian theory states that moral praise or blame can only properly attach to the agent's willing or intention, and ought to be indifferent to performed actions and their outcomes. For example, whether we succeed or fail in what we try to do nearly always depends to some extent on factors beyond our control. That is, what has been done, and what is morally judged, is partly determined by external factors.<sup>493</sup>

Similarly, as noted above, there is a morally significant difference between assault and manslaughter. The outcome of the result of a punch to the head depends on the physical constitution of the victim which, more often than not, is not known by the assailant (the eggshell skull principle), or an intervening event following an assault. For instance, the victim trips, hits his or her head on the ground, and suffers a fatal brain injury. Many might say that this means the assailant is responsible for the death, whereas the one who only causes a bruise is not responsible for a death. In moral terms, it could be fairly argued that both are equally blameworthy for assaulting their victims in the first place. The only difference between the two actions and motivation was the result. That means

---

<sup>491</sup> Ibid.

<sup>492</sup> Immanuel Kant, *Foundations of the Metaphysics of Morals*, (Thomas Kingsmill Abbott trans, ebooks@ adelaide, 2014), <https://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/index.html>.

<sup>493</sup> Nagel, above n 446, 24.

both could be equally responsible in degree, or both could be equal in their moral worth.

494

On the other hand, there is the argument that consists of ‘taking responsibility for one’s actions and their consequences’.<sup>495</sup> It is the virtue of taking responsibility in some sense for the consequences of one’s actions, even if one is not responsible for them in a pre-meditated sense. Such reasoning may be appropriate where the defendant’s conduct gives rise to an obvious danger that serious consequences may ensue, but often the connection between the unlawfulness of the defendant’s act, and its dangerousness, may be extremely tenuous. As Simester and Sullivan have pointed out, luck is too potent a factor in the imposition of liability for constructive manslaughter,<sup>496</sup> as it can turn a ‘trivial’ assault between quarrelling neighbours into a serious crime involving a custodial sentence where, as in *Mallet*,<sup>497</sup> a victim falls awkwardly and fatally bumps his head on the concrete. Although there was no threat of serious violence, Mallet was nonetheless convicted of manslaughter.

The United Kingdom’s Sentencing Guidelines state that ‘harm must always be judged in the light of culpability’, and ‘the culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence’.<sup>498</sup> It may be argued therefore, that chance or luck plays a stronger role in shaping the sentences of those convicted of ‘one punch’ violence that results in death, rather than their level of culpability.

---

<sup>494</sup> Zimmerman, above n 448, 560; Norvin Richards, ‘Luck and Desert’ (1986) 95 (378) *Mind* 198; John Greco, ‘A Second Paradox Concerning Responsibility and Luck’, (1995) 26 (1-2) *Metaphilosophy*, 81, 96.

<sup>495</sup> Susan Wolf, ‘The Moral of Moral Luck’ (2001) 31(1) *Philosophic Exchange* 1, 13.

<sup>496</sup> Andrew Simester and Bob Sullivan, *Criminal Law Theory and Doctrine* (Hart Publishing, 3<sup>rd</sup> ed, 1978) 378.

<sup>497</sup> *R v Mallet* [1972] Crim LR 260.

<sup>498</sup> England & Wales Sentencing Guidelines Council, ‘Overarching Principles: Seriousness’, (Guideline 5, December, 2004), <http://www.sentencingcouncil.org.uk/publications/item/overarching-principles-seriousness>



## 4.4 Outcome responsibility

According to Honore, outcome-responsibility means being responsible for the good and the harm we bring about by what we do.<sup>499</sup> He argues that by allocating credit for the good outcomes of actions and discredit for bad ones, society imposes outcome-responsibility.<sup>500</sup> In other words, once a person performs an act he or she cannot be sure what the outcome of that action will be, but they have chosen to act in the knowledge that they will be credited or debited with whatever turns out to be.<sup>501</sup> It is outcomes that, in the long run, make us what we are.

A similar theory is argued by Agnes Heller who puts the emphasis on intentions. That is, if a good result was intended, 'making someone responsible' carries a heightened credit, and if a bad result was intended, 'making someone responsible' carries a heightened debit, whereas with unintended results, both credit and debit are proportionally decreased.<sup>502</sup> Moore presents a *reductio* argument, which maintains that if we do not hold people responsible for the things that they cannot control, people cannot be held responsible for anything, since intentions and character are caused by factors beyond one's control.<sup>503</sup> Furthermore, as he argues in a previous article, 'we are in control of our choices because they are our choices, even though causally dependent on factors that are themselves unchosen'.<sup>504</sup> Kessler writes, as rational beings we make decisions in light of our ability to self-reflect, and we deserve to be held responsible for those decisions.<sup>505</sup> Of course, self-reflection is not an attribute that assailants who act in the heat of the moment possess. Nevertheless, it makes those decisions no less morally relevant or morally culpable. Most people however, expect to be held criminally

---

<sup>499</sup> Tony Honore, 'Responsibility and Luck' (1988) 104(3) *The Law Quarterly Review* 530.

<sup>500</sup> Ibid.

<sup>501</sup> Tony Honore, *Responsibility and Fault*, (Hart, 1999) 31.

<sup>502</sup> Agnes Heller, *General Ethics* (Basil Blackwell Ltd, 1988) 87.

<sup>503</sup> Michael S. Moore, 'The Independent Moral Significance of Wrongdoing' (1994) 5(1) *Journal of Contemporary Legal Issues*, 1, 64-70.

<sup>504</sup> Michael S. Moore, 'Causation and the Excuses', (1985) 73 (4) *California Law Review*, 1091, 1092.

<sup>505</sup> Kimberly D. Kessler, 'The Role of Luck in the Criminal Law' (1993-94) 142 (6) *University of Pennsylvania Law Review*, 2183, 2191.

responsible only for their decisions to disobey the law, and not for the workings of fate.<sup>506</sup>

Richards suggests that often we have negative feelings about those who cause harm, even when we realise they are not deserved.<sup>507</sup> Furthermore, one can justify differential treatment of the assailant who causes death, and the one who does not, even if both are equally culpable. To paraphrase Henning Jensen's argument, while both are equally culpable, there are consequentialist reasons for not subjecting the first assailant to the same degree of blame behaviour.<sup>508</sup> That is, since we all take risks, and some are less likely to lead to such harm than others, to blame everyone for simply taking such risks would require such a high standard of care, as to risk destroying our ability to function as moral agents.

On the other hand, requiring punishment for, or compensation from, those who do cause harm, is required to provide a 'restorative value' for those agents and to preserve their integrity.<sup>509</sup> But, if we take seriously the view that we cannot be morally responsible for something that is not within our control, then we would treat both assailants as equally responsible. There is, as already noted, a clear sense in which the assailant who has caused death, was in control of that death because he or she took the decision to throw the punch, and that was all that was needed to kill the victim. It may be, however, the other factors, that is, the intervening act or the eggshell skull that conspired to produce the victim's death, were not in the assailant's control at all. In this respect, the assailant responsible for the death of his victim was in no more control than his fellow assailant, who was lucky enough not to cause a serious injury. So, insofar as degree of responsibility attracts control, both assailants must be declared equally responsible. The only difference is that one will be charged with manslaughter, the other with assault. Nevertheless, it is difficult to deny the force of the argument that a person exercises

---

<sup>506</sup> This argument is the strain of philosophy known as Determinism that believes that everything is caused.

<sup>507</sup> Richards, above n 460, 198, 178-79.

<sup>508</sup> Jensen Henning, 'Morality and Luck' (1984) 59 (229) *Philosophy* 323.

<sup>509</sup> Stanford University, *The Stanford Encyclopaedia of Philosophy* 28 October, 2012 'Moral Luck', <http://plato.stanford.edu/entries/moral-luck>.

control directly over their choices, and indirectly over the consequences of their choices. As one writer has said, the problem of moral luck represents a paradox in the heart of our moral practices; it needs to be described rather than ‘solved’, since paradoxes cannot be argued away.<sup>510</sup>

## 4.5 The Role of Luck in the Criminal law

There is no doubt that the criminal law attributes major significance to the harm actually caused by a defendant’s conduct, as distinguished from the harm intended or risked.<sup>511</sup> The content of criminal law, and the structure of its offences, are widely accepted as being informed by John Stuart Mill’s harm principle: ‘That the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others’.<sup>512</sup> That is, conduct should only be criminalised if it causes harm to others. Furthermore, many offences criminalise conduct that has the potential to cause harm, even if that harm was not intended. There are, in fact, many cases in criminal law where a person’s liability to conviction, turns entirely on events outside the person’s control. While there is often potential for harm, the amount of harm caused does not add anything to wrongfulness of the offender’s conduct.

The emphasis on the harm caused can be understood as a vestige of the criminal law’s early role as an instrument of official vengeance. The Bible, for example, demands an eye for an eye, and a tooth for a tooth, providing a convenient formula for the type and amount of punishment that a wrongdoer should receive.<sup>513</sup> Actual damage was once a

---

<sup>510</sup> Nir Eisikovits, ‘Moral Luck and the Criminal Law’ in Joseph Keim Campbell, Michael O’Rourke & David Shier (eds) *Law & Social Justice* (Mit Press, 2005) 105.

<sup>511</sup> Stephen J. Schullhofer, ‘Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law’ (1974) 122(6) *University of Pennsylvania Law Review*, 1497 1498.

<sup>512</sup> Mill, above n 60, 22. An equivalent was earlier stated in Frances’ *Declaration of the Rights of Man and of the Citizen* 1789 as, ‘Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.’

<sup>513</sup> Ibid 1499; Michael Jerome and Mortimer J. Adler, *Crime Law and Social Science* (Harcourt, Brace and Co, 1933) 440, 444; See *Exodus* 21: 17-23; John Marshall, ‘Punishment for Intentions’ (1971) 80 (320) *Mind* 597.

prerequisite to the existence of a crime,<sup>514</sup> and the doctrine that an attempt to commit a crime was in itself criminal, developed slowly.<sup>515</sup>

The 'eye for an eye' principle was sometimes carried to shocking extremes. For instance, the ancient penalty for mayhem was mutilation, with the defendant being maimed to the same extent as his or her victim.<sup>516</sup> Williams has written that the only theory of punishment that explains the present law (punishing attempts less severely than the completed crime) is 'a crude retaliation theory, where the degree of punishment is linked, rather to the amount of damage done, than to the intention of an actor'.<sup>517</sup>

According to Pollock and Maitland, 'Law in its earliest days tried to make men answer for all the ills of an obvious kind that their deeds brought upon their fellows'.<sup>518</sup> The liability of the accused did not depend on fault; that he had in fact killed, or wounded or destroyed another's property was enough and no further inquiry was called for. It was quite irrelevant that it was an accident.<sup>519</sup> In effect, there appeared to be a duty to punish in proportion to the amount of harm done. However, as society became more enlightened, the law began to insist upon a requirement of fault.<sup>520</sup> Liability came to be based, not solely on the harm done, but on harm done in a blameworthy manner.

In 1883, Stephen J noted that looking to the result instead of to the actor's intent, 'seems to be a far less satisfactory test both of the moral guilt, and of the public danger of an act of violence'.<sup>521</sup> This pattern of emphasis on the actual result also permeates the American Model Penal Code.<sup>522</sup> Reckless conduct creating a risk of serious injury is a misdemeanour if no harm occurs, but it is manslaughter if death results.<sup>523</sup> It must be

---

<sup>514</sup> Pollock and Maitland, above n 358, 477.

<sup>515</sup> Francis B. Sayre, 'Criminal Attempts' (1928) 41(6) *Harvard Law Review* 821.

<sup>516</sup> Rollin M. Perkins, *Criminal Law* (Foundation Press, 2<sup>nd</sup> ed, 1969) 188.

<sup>517</sup> Glanville Williams, *Criminal Law – The General Part* (Stevens & Sons, 2<sup>nd</sup> ed, 1961) 136.

<sup>518</sup> Sir William Searle Holdsworth, *History of English Law* (Sweet and Maxwell, Vol. 11, 1938) 470.

<sup>519</sup> John C. Smith, 'The Element of Chance in Criminal Liability' [1971] *The Criminal Law Review* 63.

<sup>520</sup> *Ibid* 64.

<sup>521</sup> Stephen, above n 359, 119.

<sup>522</sup> Schullhofer, above n 477 1497, 1499.

<sup>523</sup> American Law Institute Model Penal Code 211.1 (1) (a), 211.2, 210.3

proved that the accused intended the harm, or caused it recklessly or negligently by causing harm in a manner which a reasonable person would have avoided. Nevertheless, there are to this day many cases where a person's liability to conviction, turns entirely on events which do not affect either his or her dangerousness to society or moral blameworthiness, but rather on events outside their control.<sup>524</sup> David Thomas contrasts the differential culpability between someone who causes grievous bodily harm in a pub brawl where the victim consequently dies, and the offence is upgraded to murder; and another who attempts to kill but through ineptitude or luck fails, and is convicted only of attempted murder.<sup>525</sup> The outcome, while purely the result of chance, therefore decides the degree of culpability.

The question to be posed then is: if two people act in a relevantly similar way, with relevantly similar culpability, should the mere fact that in one case the harm results, while in the other it does not make a difference, as to whether either person is criminally liable for the offence for which each is liable to be convicted, or to the sentence that each receives upon conviction?

Although this thesis is concerned with an aggressive death, similar examples can be applied in cases that do not involve aggression. For example, two drivers engage in conduct that satisfies the definition of dangerous driving. One causes death, the other does not. The latter is guilty only of dangerous driving *simpliciter*,<sup>526</sup> whereas the former is guilty of causing death by dangerous driving and faces a much heavier penalty.<sup>527</sup> The other familiar examples come from criminal attempts. For instance, Carol shoots at Ted with the intent to kill him. The bullet hits Ted and kills him. Carol is charged with murder. However, if Carol misses Ted and the bullet zings harmlessly by, Carol can only be charged with attempted murder. Although in each of these cases Carol has performed the same action with the same intention, she may be guilty of two

---

<sup>524</sup> Ibid.

<sup>525</sup> David Thomas, 'Form and Function in Criminal Law' in PR Glazebrook (ed), *Reshaping the Criminal Law* (Stevens, 1978) 21.

<sup>526</sup> Dangerous Operation of a vehicle *Queensland Criminal Code Act 1899* s 328A Maximum penalty – 200 penalty units or 3 years imprisonment.

<sup>527</sup> Dangerous Operation of a vehicle *Queensland Criminal Code Act 1899* s 3328A (4) (a) Maximum penalty - imprisonment for 10 years.

different crimes that attract vastly different sentences. This is all because of luck or chance or some act of fate.

These scenarios beg the question: why should luck play so large a part in our criminal justice system? The answer seems to be, as Horder puts it: ‘one of the striking features of almost all systems of criminal law is the primacy of the actual occurrence of harm rather than attempt or the simple risk of the harm occurring’.<sup>528</sup> But, since people are generally only responsible for the things they control, and since luck is beyond their control, people who make the same choices but produce different results could be said to be morally equivalent.<sup>529</sup> The harm doctrine, as Sanford Kadish calls it, is a ‘deep, unresolved issue in the theory of criminal liability’.<sup>530 531</sup> There is no doubt that at an instinctive level people place greater blame on the successful wrongdoer than the unsuccessful one.<sup>532</sup> Kadish also argues that the harm doctrine is not rationally supportable, notwithstanding its near universal acceptance in Western law. To make the case that the harm doctrine cannot be rationally defended, two things must be established:

- (a) That the doctrine cannot be justified in terms of the crime preventive purposes of criminal punishment: and
- (b) That neither can it be justified in terms of any convincing principle of justice.<sup>533</sup>

However, as long as a mental element in relation to serious injury, rather than death, is sufficient for manslaughter, then chance will continue to play a part in criminal law. As the New Zealand Criminal Law Reform Committee noted in its Report on Culpable Homicide, the policy of ‘grading liability according to consequences (rather than a

---

<sup>528</sup> Horder, above n 21, 209.

<sup>529</sup> Clare Finkelstein, ‘Is Risk a Harm?’ (2003) 151(3) *University of Pennsylvania Law*, 963.

<sup>530</sup> Sanford H Kadish, ‘The Criminal Law and the Luck of the Draw’ (1993-94) 84 (4) *Journal Criminal Law & Criminology*, 679.

<sup>531</sup> Fletcher, above n 73, 473-74.

<sup>532</sup> Paul H. Robinson and John M. Darley, *Justice, Liability and Blame: Community Views and the Criminal Law*, (Westview Press, 1995) 13-51.

<sup>533</sup> Kadish, above n 496, 679.

mental element) can be traced back to medieval times', but a law based 'on that foundation fails to equate liability with culpability'.<sup>534</sup>

## 4.6 Deterrence/Crime prevention

In general, there are two ways in which criminal punishment is thought to reduce or deter crime. One is by disabling the offender from further harming the community, often by way of removing them from society through incarceration. The other is by deterring others from committing similar crimes.<sup>535</sup> The question, however, is whether the actual occurrence of harm is relevant in assessing the dangerousness of the offenders, and their suitability for incapacity in the interests of public protection. Consider this in the light of the examples already mentioned. Take the youth who struck a victim who unexpectedly died. Is he more dangerous than his mate who did the same act, and for exactly the same reason, but whose victim escaped with a minor injury? Arguably not. The same is true of the dangerous driver. As Schulhofer notes, courts seldom consider the dangerousness argument, since they are ordinarily content to apply present law without seeking to justify it.<sup>536</sup>

However, cases can be found in which judges have refused to regard the harm caused as a significant indication of dangerousness. For example, in an English prosecution for reckless driving the judge remarked:

'The fact that a death resulted from a piece of dangerous driving did not make the dangerous driving any more or less so. It would be quite wrong for the court to measure a man's culpability by the amount of damage he did'.<sup>537</sup>

In that case, a man who was charged with careless driving after knocking down a pedestrian, was a month later charged with causing death by dangerous driving after the man died. The death was entirely irrelevant to the question of whether the proper charge was careless or dangerous driving, but the harm caused was evidently the main consideration in the eyes of the police.

---

<sup>534</sup> New Zealand Criminal Law Reform Committee, 'Report on Culpable Homicide' (Report, 1976) para 5.

<sup>535</sup> J H Burns and H L A Hart, *Jeremy Bentham: Introduction to the Principles of Morals and Legislation* (Methuen, 1982) 17.

<sup>536</sup> Schulhofer, above n 75, 1588.

<sup>537</sup> *Burns v Currell* [1963] 2 QB 433 (Streatfield, J).

Therefore, do we need harm to assure us of the culpability and dangerousness of the actor when the result is unintentional? As Kadish notes, reducing punishment just because, luckily, no harm results, makes no sense in terms of the purposes of punishment to identify dangerous behaviour, and to prevent its perpetrators from repeating it.<sup>538</sup> The point is not that a rational criminal law would increase the punishment for attempts; it may as well be that the law should reduce the punishment for completed offences. Rather, the point is, that punishing attempts and completed crimes differently makes no sense insofar as the goal of the criminal law, which is to identify and deal with dangerous offenders who threaten the public.<sup>539</sup>

Bjorn Burkhardt identifies a curiosity on this theme, which was prevalent during the Middle Ages.<sup>540</sup> In Germany, there were regulations which provided for a more severe punishment for the throw of a stone which missed its mark, than for one which did hit its mark. The explanation for this provision was as follows:

There is a need to punish dangerous acts. In determining punishment, an objective was to focus on the damage that was caused. If there were no tangible damages, however, then the most extreme consequences which could have possibly resulted were envisioned in order to encompass all possible cases, and ensure adequate punishment for harm that could have been caused.<sup>541</sup>

It is possible to envisage a justification for this extreme today, as a rationale for the offence of drunken dangerous driving, for example. The fact that many drunken dangerous drivers do not kill or maim someone is, in many circumstances, merely a matter of chance, and given the public's abhorrence of this practice, extreme sentences could attract some supporters. The upshot of this argument is that attempts, or risk creation, become the basis for criminal responsibility.<sup>542</sup> Thus, if a person under the influence of alcohol chooses to drive, they have created a risk whether or not they cause any harm.

---

<sup>538</sup> Kadish, above n 496, 686.

<sup>539</sup> Ibid.

<sup>540</sup> Bjorn Burkhardt, 'Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?' [1986] *Brigham Young University Law Review* 553.

<sup>541</sup> Ibid 558.

<sup>542</sup> Fletcher, above n 73, 299.



Another argument in support of this view relates to the purposes of punishment.<sup>543</sup> Punishment is, *inter alia*, a means for deterrence. The occurrence of harm is said to be irrelevant, both for specific deterrence and for general deterrence. The aim of specific deterrence is to reduce future danger from the offender, which is not served by taking harm into consideration as the amount of harm caused is not a competent indicator of dangerousness.<sup>544</sup> Zipursky makes the point that if punishment is viewed as deterrence, there is an argument that the punishments should be equal.<sup>545</sup> That is, because the culpability of character and the character are equal. The same holds true for rehabilitation. In general though, as Adam Smith observed, ‘common sense’ assesses good and evil human deeds according to their consequences.<sup>546</sup> Socio-psychological investigations also support this finding: ‘In general, the greater the harm, the greater the punishment reaction’.<sup>547</sup> Retributivists would support this argument for the reason that the state ought to be blaming someone for injuring another, in light of the culpability of the actor, and the seriousness of the injury they have caused. The real need for serious blame and punishment, they would argue, has more to do with the seriousness of what the defendant has done and less to do with culpability of character.<sup>548</sup>

To return to the dangerous driver, who drives at 100km per hour through a neighbourhood street, but who does not hit anyone. It can be said that there is wrongful conduct that needs to be deterred. The punishment in many jurisdictions would be a fine, perhaps a temporary loss of licence, and a number of demerit points. In the identical case, where two pedestrians are run over and killed because of the driver’s dangerous conduct, the same punishment would not be sufficient, because the driver has done so much more; he or she has killed two innocent people. The extra punishment

---

<sup>543</sup> Kadish, above n, 496,684-688.

<sup>544</sup> Nir Eisikovits, ‘Moral Luck and the Criminal Law’ in Joseph Keim Campbell, Michael O’Rourke & David Shier (eds) *Law & Social Justice* (Mit Press, 2005) 106.

<sup>545</sup> Benjamin C Zipursky, ‘Two Dimensions of Responsibility in Crime, Tort, and Moral Luck’, (2007) 9 (1) *Theoretical Inquiries in Law* 281, 314.

<sup>546</sup> Alexander L Macfie and David D Raphael (eds), *The Theory of Moral Sentiment*, (Clarendon Press, 1976) 27.

<sup>547</sup> Dale Millar and Neil Vidmar, ‘The Social Psychology of Punishment Reactions’ [1981] *The Justice Motive in Social Behaviour* 145.

<sup>548</sup> Zipursky, above n 510, 281.

would not, as Zapursky writes, be more permissible, it would also be appropriate.<sup>549</sup> Just as a hero is not rewarded for what he has tried to do in saving someone, but for what he has actually accomplished, so a criminal is blamed not for trying to commit a wrong, but for succeeding.<sup>550</sup> It would not, however, actually bring punishment into line with moral judgment, partly because it would make for a stark, punitive inequity. In practice, of course, as Rosebury notes:

where it is abundantly clear that the outcome of an offence has been drastically influenced by luck, courts do often attempt to reflect this in the sentence, giving greater weight in such cases to just treatment of the offender than to the slight danger of weakening deterrence.<sup>551</sup>

Burkhardt maintains that:

Society's values must be taken into account despite a certain irrationality, and despite a conflict with fixed principles of law (e.g., the principle that culpability is a necessary condition for punishment) or with fixed objectives of criminal law policy (e.g. special prevention).<sup>552</sup>

Another way of looking at the problem of luck versus culpability is that culpability attracts a certain level of punishment irrespective of the harm caused but the harm that results from a criminal offence simply aggravates the level of punishment meted out. Furthermore, luck or the lack of it is not just confined to the offence. An offender's health or employment prospects might also be seen as lucky or unlucky in terms of the punishment that is imposed by a court.

## **4.7 Just Punishment**

George Fletcher argues that 'punishment is just only if it is regarded as just by those who suffer it' and 'that those who cause harm would be more inclined to regard a more severe punishment as appropriate and just; those who fail to cause harm would be outraged if they were punished as though they had'.<sup>553</sup> Nevertheless, it is hard not to

---

<sup>549</sup> Ibid.

<sup>550</sup> Ibid.

<sup>551</sup> Brian Rosebury, 'Moral Responsibility and Moral Luck' (1995) 104 (4) *The Philosophical Review*, 499, 523.

<sup>552</sup> Burkhardt, above n 505, 553.

<sup>553</sup> Fletcher, above n 73, 483.

form the conclusion that punishment under these circumstances can look like something of a ‘penal lottery’, as Kadish has described it.<sup>554</sup>

The obvious objection to this argument is that ‘the two offenders end up being punished differently, even though they are identical in every non-arbitrary sense.’<sup>555</sup> In essence then, it can be assumed a majority of people would agree with the following two propositions:

- (1) An intentional killer deserves harsher punishment than an agent who attempts to kill but fails.
- (2) An agent who unintentionally kills deserves harsher punishment than an agent who acts in precisely the same negligent or reckless manner and does not kill.

However, the more convincing argument is what Levy calls the ‘Equal Punishment Argument’,<sup>556</sup> which suggests that agents deserve punishment only for what they have control over, and that agents ‘that have control over only their bodily motions and intentions, not the external consequences of these bodily motions and intentions’.<sup>557</sup> Therefore, two agents who perform the same actions with the same intentions should be punished equally, even if one of the agent’s actions leads to harm and the other does not.<sup>558</sup> This is an approach supported by Ashworth, who argues that since fairness is an integral element in a ‘just deserts’ approach, it would be wrong to allow random or chance factors to determine the threshold of criminal liability, or the quantum of punishment.<sup>559</sup> The emphasis in criminal liability, he argues, should be upon what the defendant was trying to do, intended to do, and believed he or she was doing, rather than upon the actual consequences of his conduct.<sup>560</sup> Levy, on the other hand, posits another moral and legal concept; *assumption of risk*.<sup>561</sup> That is, an agent assumes the

---

<sup>554</sup> Kadish, above n 496, 691.

<sup>555</sup> Ibid.

<sup>556</sup> Ken M Levy, ‘The Solution to The Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It’ (2005) 24 (6) *Law and Philosophy* 263, 264.

<sup>557</sup> Ibid.

<sup>558</sup> Ibid.

<sup>559</sup> Andrew Ashworth, ‘Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law, (1988) 19 (3) *Rutgers Law Journal*, 725, 736.

<sup>560</sup> Ibid.

risk of a given consequence (C) when the agent voluntarily performs a given action (A),’ and the agent can reasonably be expected to have known that A would significantly increase the probability of C.<sup>562</sup>

## **4.8 The Assumption of Risk**

This scenario fits the genesis of this thesis, the ‘one punch’ killer. To paraphrase Levy, an agent who throws a punch at another assumes a risk of a probable outcome (in this case, death) that was reasonably foreseeable. The agent, therefore, voluntarily created the situation that he or she should have known, and would let the moral status of their action be determined by one or other reasonably foreseeable outcomes of their action. This is a compelling argument, except to say, where crimes of minor violence are involved, the risk of a fatal outcome is not usually reasonably foreseeable, and the assumption of risk in achieving the outcome is more likely to be at the threshold of ‘possible’, rather than ‘probable’ or ‘likely’. Furthermore, as some have argued, there is no such thing as an objective measure of probability; there are only degrees of belief, or confidence, about the likelihood of a certain event occurring.<sup>563</sup> This is an argument that will be returned to in a later chapter.

Levy’s ‘assumption of risk’ is not accepted by everyone. According to Morse, for example, although the ‘assumption of risk’ argument may have validity in tort, it does not have justification in criminal law.<sup>564</sup> In relation to the rule that demands the defendant must take the victim as the defendant finds him or her, Morse says the risk of more seriously harming the small number of potentially vulnerable victims is simply too low to justify enhanced blame and penalty.<sup>565</sup> When death or grievous bodily harm does unexpectedly occur, this is just bad luck unless the assailant is aware that the victim is vulnerable. To punish for the greater harm is akin to a punishment style ‘lottery’. The defendant should be punished for no more, even if greater harm unfortunately results. Because, in principle, all crimes can create the risk of unlucky, further harmful

---

<sup>561</sup> Levy, above n 521, 265.

<sup>562</sup> Ibid.

<sup>563</sup> Finkelstein, above n 495, 973.

<sup>564</sup> Morse, above n 450, 404.

<sup>565</sup> Ibid.

consequences. Without proof of *mens rea* for such consequences, the potential agents will not be guided, and simply be part of a lottery that is not dependent on their culpability.

Finally, the harm doctrine cannot be justified in terms of any convincing principle of justice as no acceptable moral or political theory holds that people have an absolute right to be free from harm. The International Covenant on Civil and Political Rights does provide for obligations under the right to life.<sup>566</sup> However, it does not refer to harm presumably because harmful accidents will inevitably occur despite the exercise of reasonable care. Because only our intentional actions are fully up to us, all we can fairly ask of each other is that none of us should intentionally place fellow citizens unreasonably at risk of harm.

## 4.9 The Correspondence Principle

Also relevant where a ‘one punch’ assault results in death, is what is commonly referred to as the principle of correspondence. It means that not only should it be established that the defendant had the required fault, in terms of *mens rea*; it should also be established that the defendant’s intention, knowledge or recklessness related to the proscribed harm.<sup>567</sup> The correspondence principle has an ancient pedigree. According to Simester and Sullivan, as far back as 1798, Lord Kenyon described it as ‘a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*; the intent and the act must both concur to constitute the crime’.<sup>568</sup> This principle is also found in Bracton and Coke. According to Bracton:

For take away the will and every act will be indifferent, because it is your intent which gives meaning to your act, and a crime is not committed unless an intent to injure exists; neither is a theft committed without the intention to steal.<sup>569</sup>

Therefore, over many years, the general rule of English law is that no crime can be committed unless there is *mens rea*.<sup>570</sup> This meant that, subject to limited exceptions,

---

<sup>566</sup> Article 6 (1) of the ICCPR provides that: Everyone has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.

<sup>567</sup> Andrew Ashworth, *Principles of Criminal Law*, (Oxford University Press, 6<sup>th</sup> ed, 2009) 76.

<sup>568</sup> Simester and Sullivan, above n 462, 186.

<sup>569</sup> Bracton, *De Legibus et Consuetudinibus Angliae*, 101b. Cf. Coke, *Third Institute* (1641) 6, 107.

criminal conviction required something more than the mere occurrence of harm. Ashworth writes that if the conduct element of a crime is ‘causing serious injury’, the principle of correspondence demands that the fault element should be intention or recklessness as to causing serious injury, and not intention to recklessness as to some lesser consequence such as a mere assault.<sup>571</sup>

Another example is the law of murder: in English law a person may be convicted of murder if he or she either intended to kill or cause grievous bodily harm. However, the latter species of fault, breaches the principle of correspondence: the fault element does not correspond with the conduct element (which is causing death), and so a person is liable to conviction for a higher crime than contemplated.<sup>572</sup>

Critics of the correspondence principle claim it is an ideal, rather than an accurate or descriptive generalisation about crimes.<sup>573</sup> According to Horder, in so far as the correspondence principle does have moral force, it is misleadingly labelled. He argues it ought to be styled the ‘proximity’ principle, since there are many instances where it would be wrong to require an exact match between *actus reus* and *mens rea*, rather than simply a close approximation between the two.<sup>574</sup> Therefore, Horder claims, the law is, in some circumstances, justified in departing from the correspondence principle. He argues that defendants who direct their efforts towards harming someone should be liable for the harm caused, even where that harm is greater than the harm intended or foreseen, because they ‘deserve’ their bad luck.<sup>575</sup> But, as Smith and Hogan point out, despite weighty academic opinion that ‘the torch of orthodox subjectivism’ should be doused, the subjective approach continues to be favoured by the judiciary.<sup>576</sup> A ringing endorsement by Lord Bingham of Cornhill was stated in one of the highest tribunals, in the landmark case of *G*:<sup>577</sup>

---

<sup>570</sup> *Williamson v Norris* [1899] 1 QB 7, 14 (Lord Russell).

<sup>571</sup> Ashworth, above n 532, 76.

<sup>572</sup> *Ibid.*

<sup>573</sup> Jeremy Horder, ‘A Critique of the Correspondence Principle in Criminal Law’ [1995] *Criminal Law Review*, 759.

<sup>574</sup> *Ibid* 770.

<sup>575</sup> *Ibid.*

<sup>576</sup> John C Smith and Wayne Hogan *Criminal Law* (Oxford University Press, 13<sup>th</sup> ed, 2011) 104.

<sup>577</sup> *G* [2003] UKHL 50, [2004] 1 AC 1034.

It is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily acceptable as culpable also. It is clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.<sup>578</sup>

However, as Smith and Hogan point out, despite this strong endorsement of the subjectivist position from the House of Lords, the English Parliament has demonstrated a willingness to create serious offences in which the fault element is explicitly objective.<sup>579</sup>

#### **4.10 Fair Labelling**

Labelling is defined by the *Concise Oxford English Dictionary* as 'to attach to, to assign to a category'.<sup>580</sup> For the purposes of this thesis regarding 'one punch' assaults that result in death, the consequence of death can result in the offender being not only charged with manslaughter, but also labelled in the public arena as a 'killer'. It could be a sense of grievance for the offender that this label does not accurately reflect the nature of his or her guilty act. In other words, he or she is 'unfairly labelled'. According to William Wilson, precise, meaningful labels are as important as justice in the distribution of punishment.<sup>581</sup> A criminal provision, he argues, is better able to communicate the boundaries of socially acceptable behaviour if it packages crimes in morally significant ways.<sup>582</sup> That is why we have various specific crimes of reckless endangerment, such as causing death by dangerous driving, rather than manslaughter.

---

<sup>578</sup> *G* [2003] UKHL 50.

<sup>579</sup> Smith and Hogan, above n 541, 105.

<sup>580</sup> H W Fowler & F G Fowler, *Concise Oxford English Dictionary* (Clarendon Press, 1964) 672.

<sup>581</sup> William Wilson, 'What's wrong with murder?' [2007] 1(2) *Criminal Law and Philosophy* 157, 162.

<sup>582</sup> *Ibid.*

‘Fair labelling’ is a term initiated by Williams in response to the phrase ‘representative labelling’, first coined by Vinerian Professor of English law at the University of Oxford, Doctor Andrew Ashworth in 1981.<sup>583</sup> In a contribution to the memorial volume to Sir Rupert Cross, Ashworth argued ‘the label applied to an offence ought fairly to represent the offender’s wrongdoing.’<sup>584</sup> By this, he meant that the particulars stated in the conviction should convey the offender’s moral guilt, or at least should not be misleading as to that guilt. One reason for this position was that, at a later occasion, the conviction may be read out in court and thus affect a future sentence. Judges in Queensland, for instance, are statutorily bound to have regard to previous convictions.<sup>585</sup> Therefore, there is a need for criminal records to accurately capture the essential elements of an offence. It is only fair that, if decisions are to be made about the offender’s fate, that relies, in part, on previous convictions, the information provided be as accurate and informative as possible. Conviction of certain offences also triggers action such as the placing of an offender on a sex offenders’ register.<sup>586</sup> An example of this action can be found in the English case of *R v Forbes* (2002), where the defendant attempted to bring pornographic videos into the country.<sup>587</sup> He said he thought the videos contained adult pornography whereas, in fact, they contained child pornography. He was convicted and sentenced to six months imprisonment, and, in addition, placed on the sex offender’s register.<sup>588</sup> In this sense, the public record matters.

While employers may not have any qualms about hiring a ‘white collar’ criminal in a job involving contact with children, it would be a different matter hiring a sex offender. In similar vein, Morse has observed that the criminal law can make two kinds of mistakes concerning ‘just deserts’. It may find non-culpable defendants culpable, or culpable defendants more culpable than they really are.<sup>589</sup> That is, convicting the innocent or, more accurately, over-convicting. However, it should be noted that the fair

---

<sup>583</sup> Glanville Williams, ‘Convictions and Fair Labelling’ (1983) 42(1) *Cambridge Law Journal* 85.

<sup>584</sup> Andrew Ashworth, ‘The Elasticity of *Mens Rea*’ in C.F.H. Tapper (ed.), *Crime, Proof and Punishment: Essays in memory of Sir Rupert Cross*, (Lawbook, 1981) 45.

<sup>585</sup> Sentencing guidelines, *Penalties and Sentences Act 1992* (Qld) s 9.

<sup>586</sup> *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld)

<sup>587</sup> *R v Forbes* [2002] 2 AC 512.

<sup>588</sup> He unsuccessfully attempted to overturn this requirement, see *Forbes v Secretary of State for the Home Department* (2006) EWCA Civ 962.

<sup>589</sup> Morse, above n 450, ‘409.



labelling principle works both ways. Convictions should not falsely exaggerate the defendant's guilt, but they should not conceal it either. Williams gives the example of a terrorist trying to steal explosives from a shed only to find the shed empty.<sup>590</sup> The conviction would record simply that the offender attempted to steal some or all contents of the shed when it should record that he attempted to steal explosives.

Of course, it could be argued that labelling, in the general sense, is an academic term and is not relevant in so far as a court is concerned except to identify offences and the maximum penalties that attach to them. In other words, judges or lawyers are not influenced by labelling.

#### **4.11 The Principle of Fair Labelling**

The principle of fair labelling now appears in Ashworth's *Principles of Criminal Law*, and other texts on criminal law, as one of a number of normative principles governing criminal liability.<sup>591</sup> The concern of fair labelling, Ashworth states:

Is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.<sup>592</sup>

In a practical sense, fair labelling is demonstrated in the law to justify separating the offences, for example, murder and manslaughter, and distinguishing between rape and other serious sexual offences. Most systems of criminal law divide offences into broad categories. The *Queensland Criminal Code Act 1899*, for example, divides offences into nine parts, including offences against the administration of justice, offences against the public, and offences against the person. The parts are then subdivided into chapters, before the level of the individual offence is reached – offences against the person, for example, is subdivided into criminal homicide, manslaughter, assault, etc. and individual offences are explicitly named. The particular groupings will vary depending on the code concerned, although there is usually a significant degree of similarity. Such categorisation allows for efficient drafting, and definitions which are common to a

---

<sup>590</sup> Williams, above n 548, 95.

<sup>591</sup> Ashworth, above n 532, 88; Andrew Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, (Hart Publishing, 2007) 21, 30; J. Herring, *Criminal Law: Texts, Cases and Materials*, (Oxford University Press, 2<sup>nd</sup>ed, 2006) 19.

<sup>592</sup> Ashworth, above n 532, 88.

group of offences can be conveniently located in a manner which avoids unnecessary repetition.<sup>593</sup>

Arguing against a call for general endangerment offences, Clarkson contends that the criminal law is a communicative enterprise, and the principle of fair labelling dictates that offences be labelled and structured in a manner that conveys the wrongdoing involved, and the level of seriousness of the offence.<sup>594</sup> Having specific endangerment offences enables one to focus on the wrongdoing and the risks involved to determine the appropriate level of liability and punishment.<sup>595</sup> For example, dangerous driving and recklessly endangering life while damaging the property of another, involves different wrongs with different degrees of culpability and risk. Separate offences therefore enables them to ‘fulfil the educative or “fair warning” function of singling out situations which carry a particular risk of danger’.<sup>596</sup> Fair warning is one of the fundamental principles underpinning the criminal law as people should know in advance what conduct is impermissible.<sup>597</sup>

Grouping of offences is also helpful for procedural and sentencing reasons. At the macro-level, this sort of categorisation does not lend itself to any injustice, but the concern is at the micro-level where the nominated crime may not fit the offender’s culpability. As Chalmers and Leverick have pointed out, given that a criminal record has a well-documented deleterious effect on employability and earning power, it would clearly be unfair to an offender for his or her criminal record to misrepresent their wrongdoing.<sup>598 599</sup> In his original article Ashworth noted that:

Once the label is entered on the person’s criminal record the passage of time will dim recollections of the precise nature of the offence and may result in the label being

---

<sup>593</sup> See, for example, the definitions of ‘assault’ and ‘assault occasioning bodily harm’ *Criminal Code* 1899 (Qld) s 335 and s 339.

<sup>594</sup> Christopher M V Clarkson, ‘General Endangerment Offences: The Way Forward?’ (2005) 32 (1) *University of Western Australia Law Review*, 131, 141.

<sup>595</sup> *Ibid.*

<sup>596</sup> Ashworth, above n 532, 310.

<sup>597</sup> *Ibid* 75.

<sup>598</sup> James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) *The Modern Law Review* 217, 223.

<sup>599</sup> Helen Lam and Mark Harcourt, ‘The Use of Criminal record in Employment Decisions: the Rights of Ex-offenders, Employers and the Public’ (2003) 47 (3) *Journal of Business Ethics*, 237, 242.

taken at face value. Both out of fairness to the individual and in order to ensure accuracy in our penal system, therefore, the legal designation of an offence should fairly represent the nature of the offender's criminality.<sup>600</sup>

#### 4.12 Too Much Discretion for Judges?

Another argument that has been used for fair labelling is that wide offence labels can give too much discretion to judges. This point has been made by Clarkson, who argues that the offence of manslaughter in English law, fails to distinguish sufficiently between different degrees of blameworthiness, placing too much power to decide the fate of the offender, in the hands of judges.<sup>601</sup>

It is not all one-sided, however. Jurors in a trial for murder are entitled to bring in a verdict of manslaughter even though, on the evidence, the case is one of murder or nothing.<sup>602</sup> As Dixon J noted in *Packett v The King*, to tell the jury that they do not have such a power is to state what is not correct in law, and a prisoner is entitled to complain in a Court of Criminal Appeal of such a direction.<sup>603</sup> This is a further indication that manslaughter is a good example of an offence that has a wide range of culpability, as Spigelman CJ acknowledged in *R v Forbes* '... manslaughter is almost unique in its protean character as an offence'.<sup>604</sup> (See in particular the observations of Gleeson CJ in *R v Blacklidge* (Unreported).<sup>605</sup> In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder. It is also relevant to recognise that, although manslaughters can be characterised in different ways, particularly in the various contexts which may reduce what would otherwise be a murder to manslaughter, the degree of variation *within* any such category is generally also over a wide range. Matters of fact and degree arise in all categories of manslaughter.

---

<sup>600</sup> Ashworth, above n 549, 56.

<sup>601</sup> Christopher M V Clarkson 'Context and Culpability in Involuntary Manslaughter' in Ashworth and Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 142.

<sup>602</sup> *Brown v The King* (1913) 17 CLR 570.

<sup>603</sup> *Packett v The King* (1937) HCA 53.

<sup>604</sup> *R v Forbes* (2005) 160 A Crim R 1, 133–134.

<sup>605</sup> *R v Blacklidge* (NSWCCA, Unreported, 12 December 1995).

These remarks point towards the importance of labelling so that it results in fairness to the offender. This is because, the offence of manslaughter varies widely in its seriousness, with some cases falling just short of murder, and the defendant being sentenced to long periods of imprisonment.<sup>606</sup> But, in rare cases, some offenders convicted of manslaughter only receive suspended sentences.<sup>607</sup> Another report suggests that women who appeal against murder convictions after killing violent partners, are motivated to do so as much by the sense of unfairness they feel at being labelled ‘murderers’, as by the hope of a sentence reduction.<sup>608</sup> Obviously the symbolism of the offence is meaningful, as it can delineate the degree of condemnation that should be attributed to the offender, and signals to society how that particular offence should be regarded.<sup>609</sup> As Simester and Sullivan have put it:

The criminal law speaks to society as well as wrongdoers when it convicts them, and it should communicate its judgment with precision, by accurately naming the crime of which they are convicted.<sup>610</sup>

The symbolic function of the offence name has often been cited as a reason why, for instance, it is appropriate to retain a distinction between murder and manslaughter.<sup>611</sup> The New South Wales Law Reform Commission noted that the terms ‘murder’ and ‘manslaughter’ have long been recognised by the community to convey differing degrees of moral condemnation for different cases of killing, with particular stigma attaching to the term ‘murder’. If the murder/manslaughter distinction were abolished, the moral force of those labels would be lost.<sup>612</sup> There would follow public confusion and misunderstanding of the court’s finding on an individual’s criminal responsibility,

---

<sup>606</sup> For example, in the English case of *Hussain* [2004] 2 Cr App R (S) 497, where a sentence of 18 years was upheld for manslaughter by participating in the petrol bombing of a house, resulting in the death of eight people.

<sup>607</sup> ABC TV, ‘A Mother gets suspended sentence for four –year-old’s manslaughter’, *ABC News*, December 18, 2008. This was the result of a mother denying her child medical treatment for religious reasons; *R v Mallet* [1972] Crim LR 260.

<sup>608</sup> Justice for Women, ‘Partial Defences to Murder: Response from Justice for Women’ (Consultation Paper 173 United Kingdom Law Commission, 2004) 13.

<sup>609</sup> Ashworth describes this as the ‘public communication’ function of fair labelling: n 53 above, 89.

<sup>610</sup> Simester and Sullivan, above n 556, 30.

<sup>611</sup> New South Wales Law Reform Commission, ‘Partial Defences to Murder: Diminished Responsibility’ (Report 82, 1997) Chapter 2, 6.

<sup>612</sup> *Ibid.*

and consequently the public would be less likely to understand and accept sentences imposed for unlawful homicide.

The Commission was fearful that with the trend for sensationalist reporting of sentencing matters in the media, low sentences for a crime of ‘unlawful homicide’, without any other term to indicate distinctions in degrees of culpability, could easily be misunderstood by the public. Such misunderstanding, the Commission said, would tend to bring the criminal justice system into disrepute.<sup>613</sup> To revert to the legal shibboleth, not only must justice be done, but fair labelling helps to ensure that it is seen to be done.

This position was also recognised by the English Law Commission, when it said morally significant labels such as ‘manslaughter’ or ‘murder’ should not be used to convey such a broad range of conduct that their currency becomes debased, and the label becomes unfair, or lacking in proper meaning’.<sup>614</sup>

If this were the case, it is also arguable that the more serious forms of crime that manslaughter describes might come to be regarded as less serious, because it is also used to describe less heinous crimes. On the other hand, as the Law Commission noted in its report concerning involuntary manslaughter, juries might be reluctant to convict, for example, a highly incompetent doctor of manslaughter, because of the perceived gravity of the offence.<sup>615</sup> The insistence of fair labelling does present the possibility of an ever expanding number of offences, but this is preferable, it is argued, than too broad a range which does not accurately label the offence.

Simester and von Hirsch pose the question: ‘Do we really need to distinguish theft from deception, rape from sexual assault, or between various degrees of injurious assault’? Or, they ask, ‘would it be enough just to have a few generic crimes’?<sup>616</sup> Their answer is a resounding no. Enacting only generic crimes would disregard the fact that, within each field of harmful wrongdoing, each existing offence may involve a different wrong, a

---

<sup>613</sup> Ibid.

<sup>614</sup> Law Commission for England and Wales, ‘Murder, Manslaughter and Infanticide’ (Report No.304, 2006) 2.5.

<sup>615</sup> Law Commission for England and Wales, above n 41, 3.4.

<sup>616</sup> Andrew Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart, 2011) 203.

different harm or both.<sup>617</sup> As Ashworth notes, the primary argument should be about what it is right to do, not what is politically prudent.<sup>618</sup>

#### 4.13 Fairness to the Victim

Fair labelling is not just for the benefit of the offender, but also for the victim of the offence. Furthermore, the degree of punishment imposed has a meaning, which can be understood as an expression of the victim's valuing of the injury that has been caused. George Fletcher maintains that allocating blame places the victim and the perpetrators on an equal footing.<sup>619</sup> Trials of criminals strongly suggest that, unlike revenge, this process re-dignifies the victims, and this feature becomes central to the justification of punishment.<sup>620</sup> Horder has argued that 'if the offence in question gives too anaemic a conception of what one has been convicted of, it is neither fair to the defendant, nor to the victim'.<sup>621</sup>

This is one of the criticisms of the recent amendment to the Western Australian Criminal Code, which provides for a new offence of 'unlawful assault causing death' to specifically deal with 'one punch' cases. The family of the victims of a 'one punch' killer argues that the charge does not adequately reflect the seriousness of the crime.<sup>622</sup> Chalmers and Leverick also note that the Law Reform Commission of Canada argued in similar vein when it recommended that the offence of rape be abolished, with conduct that would previously have been classed as rape being labelled as sexual assault.<sup>623</sup> This recommendation was implemented in Canada in 1983.

---

<sup>617</sup> Ibid.

<sup>618</sup> Ashworth, above n 532, 88.

<sup>619</sup> George P Fletcher, 'The Place of Victims in the Theory of Retribution' (1999) 3 (1) *Buffalo Criminal Law Review*, 51, 52.

<sup>620</sup> Jaime Goti Malamud, 'Rethinking Punishment and Luck' (2004) 39 (4) *Tulsa Law Review*, 861, 872.

<sup>621</sup> Jeremy Horder, 'Re-Thinking Non-Fatal Offences Against the Person' (1994) 14 (3) *Oxford Journal of Legal Studies* 35.1.

<sup>622</sup> Todd Cardy, above n 280, <http://www.perthnow.com.au>.

<sup>623</sup> Chalmers and Leverick, above n 563 235.

Before the reform, three separate offences of rape, attempt to commit rape and indecent assault existed.<sup>624</sup> These were replaced by three new offences: sexual assault, sexual assault with a weapon, and aggravated sexual assault.<sup>625</sup> One of the arguments put by the Commission was that in being labelled as a victim of rape, victims are unfairly stigmatised.<sup>626</sup> On the other hand, there is research that shows victims of unwanted sexual penetration would prefer that the offender is convicted of rape, as a conviction for sexual assault does not fairly label the offender for the crime committed. Loh has argued that in Canada ‘many women victims prefer to see their assailants convicted of third degree rape, rather than first or second degree assault, even though the penalty for the rape offence is much lower’.<sup>627</sup>

The Canadian experience was replicated in Victoria, where the Law Reform Commission, in discussing whether to re-label the offence of rape in order to reflect the move away from the traditional common law definition, noted that the main argument to retain the label rape was that:

The term rape is synonymous in our culture with a particularly heinous form of behaviour. The application of the term rapist to a person is particularly effective and appropriate form of stigma. It is claimed that removal of the label would inevitably detract from the image of the behaviour in the public mind, especially over a period of time.<sup>628</sup>

As with Canada, there was discussion as to whether the label ‘rape’ may stigmatise the victim and lead to a reduction in the rate of reporting.

According to Chalmers and Leverick, the legislative change in Canada was followed by an increase in the number of reported incidents of sexual assault, which might suggest

---

<sup>624</sup> *Criminal Code 1985* (Can) ss 143, 145, 149 respectively.

<sup>625</sup> *Criminal Code 1985* (Can) ss 271-273.

<sup>626</sup> Law Reform Commission of Canada, ‘Sexual Offences’ (Working paper No 22, 1978) 22.

<sup>627</sup> Wallace D Loh, ‘What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling’ (1981) 37 (4) *Journal of Social Issues* 28, 37.

<sup>628</sup> Law Reform Commission of Victoria, ‘Rape and Allied Offences: Substantive Aspects’ (Discussion Paper No 2, 1986) 51.

that the rape label discouraged victims from coming forward.<sup>629</sup> Although they caution that the increase was also attributed to the publicity surrounding the reform process.<sup>630</sup>

Victims, it must be said, result from different circumstances. For example, in a Californian case, *People v Washington*, the defendant and his accomplice, James Ball, attempted to rob a service station.<sup>631</sup> In the course of the robbery, a victim, John Carpenter, shot and killed Ball. The defendant was convicted of the murder of his accomplice, Ball.<sup>632</sup> On appeal before the Supreme Court of California, the defendant argued that he should not be charged with Ball's murder, because a robber and not a victim was killed, and a victim and not a robber, did the killing. The court decided not to reverse his conviction on the first ground. It reasoned that 'a distinction based on the person killed would make the defendant's criminal liability turn upon the marksmanship of victims and policemen: *A rule of law cannot reasonably be based on such a fortuitous circumstance*'<sup>633</sup> (my emphasis). Hence, the court was unwilling to allow a defendant's responsibility to be determined by what target the bullet found.

#### 4.14 Proportionality

There is also the principle of proportionality to consider. That is, the punishment for a given crime should be proportional to that crime's seriousness, which is fundamental to the common law of sentencing. For instance, in 1215, three chapters of the *Magna Carta* were devoted to making sure that 'amercements' were not excessive.<sup>634</sup> Its significance has also been endorsed by the High Court of Australia in the case of *Veen v The Queen [No.1]*,<sup>635</sup> and restated by that court in *Veen v The Queen [No.2]*.<sup>636</sup> The

---

<sup>629</sup> Chalmers and Leverick, above n 563, 236.

<sup>630</sup> Julian V Roberts and R J Gebotya, 'Reforming Rape Laws: Effects of Legislative Change in Canada' (1992) 16 (5) *Law and Human Behavior* 555.

<sup>631</sup> *People v Washington* [1965] 62 Cal 2d 777.

<sup>632</sup> *Californian Penal Code 1872* s 189, which provides in part: 'All murder committed in the perpetration or attempt to perpetrate robbery is murder in the first degree'.

<sup>633</sup> *Ibid.*

<sup>634</sup> Chapters 20-22. The principle was repeated and extended in the first *Statute of Westminster* (1275) 3 Edw I, c 6.

<sup>635</sup> *Veen v The Queen [No 1]* (1979) 143 CLR 458.

<sup>636</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465.



principle is one which commands unanimous support within the court.<sup>637</sup> As Fox has pointed out, the idea that a response must be commensurate to the harm caused, or sought to be prevented, is to be found in many other areas of the law, both criminal and civil.<sup>638</sup> These include the defences of provocation and self-defence, and awards of compensatory damages for personal injury or death.<sup>639,640</sup> According to Gross, punishment is proportional to the seriousness of the crime, when the punishment is sufficient, but not more severe than necessary to achieve that aim.<sup>641</sup>

Breaches of the proportionality principle has also been seen in various jurisdictions around the world as Human Rights violations.<sup>642</sup> For example, the European Union Charter of Fundamental Rights declares that ‘the severity of penalties must not be disproportionate to the criminal offence’.<sup>643</sup> Article 5 of the Universal Declaration of Human Rights states that: ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Thus, for example, in the English case of *R v Offen (No 2)*,<sup>644</sup> Lord Woolf CJ relied on both Article 5 of the European Convention on Human Rights, which outlaws arbitrariness, and on Article 3, which outlaws inhuman and degrading punishment, to establish a ‘constitutional’ requirement that sentences must not be disproportionate.<sup>645</sup>

Punishment, particularly imprisonment, constitutes a *prima facie* violation of an individual’s right to liberty. Furthermore, in principle, imprisonment can only be justified where a person has been convicted of a serious offence. This is pertinent to this thesis when one considers the serious punishment that faces a person who causes death

---

<sup>637</sup> Richard G Fox, ‘The Killings of Bobby Veen: The High Court on Proportion in Sentencing’ (1988) 12 (6) *Criminal Law Journal* 339.

<sup>638</sup> Richard G Fox, ‘The Meaning of Proportionality in Sentencing’, (1993-94) 19 *Melbourne University Law Review*, 491.

<sup>639</sup> Stanley Yeo, ‘Proportionality in Criminal defences’ (1988) 12 (4) *Criminal Law Journal* 211.

<sup>640</sup> Harold Luntz, *Assessment of Damages for Personal Injury and Death*, (LexisNexis Butterworths, 3<sup>rd</sup> ed, 1990) 3-5.

<sup>641</sup> Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) 438.

<sup>642</sup> Dirk Van Zyl Smit and Andrew Ashworth, ‘Disproportionate Sentences as Human Rights Violations’ (2004) 67 (4) *Modern Law Review* 541.

<sup>643</sup> *Charter of Fundamental Rights of the European Union*, [2000] OJ (c364) 1 (Dec 7, 2000) Article II 49 (3).

<sup>644</sup> *R v Offen (No 2)* [2001] 1 Cr App R 372.

<sup>645</sup> Van Zyl Smit and Ashworth, above n 607, 543.

through ‘one punch’. A conviction for manslaughter or, in some cases murder, is a damning indictment on a person’s character, and carries serious ramifications for their future. It also carries in most jurisdictions, exposure to life imprisonment. The very name of the offence arouses horror, and it has been criticised, since most cases do not involve anything remotely akin to slaughter.<sup>646</sup> If anything, the term manslaughter more accurately describes mass killings of the type that happen at the hands of deranged psychopaths, or even war crimes. Moreover, the label is not accurate, as not all manslaughters have male victims, nor are they all committed by men.

As noted in the introduction to this chapter, virtually any intentional blow, no matter how slight, potentially exposes a person to a manslaughter conviction, provided it is not trivial or negligible in character. However, the term manslaughter is particularly unsuitable for cases like these, where it implies a much higher level of culpability for the deaths caused than is the case. Furthermore, the Australian Model Criminal Code Officers Committee said this was harsh, unjust and contrary to axiomatic criminal law principles.<sup>647</sup>

It also noted that where death results, but a lesser offence was intended, ‘the defendant can be prosecuted for the offence he or she intended to commit’.<sup>648</sup> That is, in ‘one punch’ cases that result in death, the offender is certainly morally culpable, but not for manslaughter. The Model Criminal Code Committee recommended a new offence of ‘dangerous conduct causing death’, and Western Australia has introduced an offence of ‘unlawful assault causing death’.<sup>649</sup> These offences would seem to fit within the principles of ‘fair labelling’ and ‘proportionality’ by making sure those who indulge in violence do not escape conviction, but they are fairly labelled and the punishment they receive is not out of proportion to the crime’s seriousness.

For example, an Aboriginal man who stabbed to death his brother-in-law in a remote area of Western Australia as ‘tribal payback’, pleaded guilty to assault causing death, after initially being charged with inflicting grievous bodily harm, which was later

---

<sup>646</sup> Graham Virgo, ‘Back to Basics: Reconstructing Manslaughter’ (1994) 53 (1) *Cambridge Law Journal* 44, 52.

<sup>647</sup> Model Criminal Code Officers Committee, above n 41, 65, 149.

<sup>648</sup> Ibid 63.

<sup>649</sup> Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12.

upgraded to manslaughter. He was sentenced to an 18-month suspended sentence (he had already spent 9 months remanded in custody).<sup>650</sup> In her sentencing remarks, Justice Lindy Jenkins accepted the defendant's belief that he did not intend to kill his victim.<sup>651</sup> Unlike some other assault causing death cases, the decision in this instance, did not appear to attract controversy.

However, in the final analysis, it is often the jury that makes the decision about what charge is appropriate. For instance, a Western Australian man was found guilty of murdering a man by pushing him out of a pub window, notwithstanding the fact that the less severe charges of manslaughter and unlawful assault causing death were available to the prosecution.<sup>652</sup> The excuse of accident was raised, because the window through which the victim was pushed was not made of safety glass; had it been so, it was highly unlikely the victim would have fallen through it. Unfortunately, for the offender, the 'accident' excuse did not prove successful as the jury appeared to prefer the prosecution argument; that a reasonable person would have known the dangers of pushing a man standing in front of a second-storey window.<sup>653</sup> Incidentally, this case is another example of the fallacy of the argument that the 'accident' excuse is an easy 'get out of gaol card' for violent offenders. Juries, it appears, are a lot more discerning than what their critics give them credit for.

## 4.15 Conclusion

In criminal law, what is paramount is not the amount of harm to the victim, but the offender's dangerousness, need for rehabilitation, and moral blameworthiness.<sup>654</sup> In the case of the two young assailants referred to in the opening paragraph of this chapter, who throw identical punches that end in different outcomes, the issue of dangerousness does not really apply. There may be need for rehabilitation in the sense of anger

---

<sup>650</sup> Anne-Louise Brown, 'Tribal payback' resulted in stab death', *The Sydney Morning Herald* (Sydney), 27 June 2012, 17.

<sup>651</sup> *Western Australia v Lillias* [2012] WASCR 100, [19].

<sup>652</sup> One News, 'Bouncer in tears after guilty death-fall verdict' Thursday June 21 2012 (online) <http://tvnz.co.nz/national-news/bouncer-in-tears-after-guilty-death-fall-verdict-4939784>.

<sup>653</sup> *Ibid.*

<sup>654</sup> James J Gobert, 'The Fortuity of Consequence', (1993) 4 (1) *Criminal Law Forum* 1, 45.

management, but not much more.<sup>655</sup> Certainly they are morally blameworthy for lashing out and causing harm, but not necessarily the outcome of death in the case of the ‘unlucky’ assailant, as it may be said to be not reasonably foreseeable. Of course surrounding circumstances play a part in foreseeability; for example, a fight on a sandy beach may be less dangerous than one on a road way or footpath and a single punch in the course of a consensual fight as opposed to a ‘king hit’ from behind may be viewed differently by a tribunal of fact. This also relates to the principle of proportionality in that the punishment for a given crime should be proportional to the crime’s seriousness.

Although we cannot avoid the role of luck in our daily lives, it is questionable whether it should play such a major part in criminal law. As Richard Parker observes, ‘Fortune may make us healthy, wealthy, or wise, but it ought not to determine whether we go to prison.’<sup>656</sup> That is, in criminal law we should try as much as possible to take luck out of decisions about blame and punishment, as a rational system for judging human behaviour should pay attention to choice, not chance.<sup>657 658</sup> Emphasising results, which often occur by chance, could be seen to misdirect the justice system away from its primary purpose, and the best way to avoid this occurrence should be to divert attention away from results, and re-examine the issues. The end product - a fairer, more rational and coherent system of criminal law - should be worthwhile. Whether this hypothesis accords with the public interest in terms of justice for ‘one punch’ killers will be explored in the next chapter.

---

<sup>655</sup> Christopher I Eckhardt, Rita E Samper & Christopher M Murphy, ‘Anger Disturbances Among Perpetrators of Intimate Partner Violence Clinical Characteristics & Outcomes of Court-Mandated Treatment, (2008) 23(11) *Journal of Interpersonal Violence* 1600-1617.

<sup>656</sup> Richard Parker, ‘Blame, Punishment and the Role of Result’ (1984) 21(3) *American Philosophy Quarterly*, 269.

<sup>657</sup> Morse, above n 450, 378.

<sup>658</sup> Ashworth, above n 524, 770.



## 5 COMMUNITY EXPECTATIONS

### 5.1 Introduction

As the genesis of this thesis arose from community concerns, it is pertinent to examine what part the public interest should play in deciding the just way of dealing with the problem of ‘one punch’ killers.

It is said that modern judges and lawyers justify the criminal law in secular terms of ‘the public’.<sup>659</sup> Although, it must be noted, that not all judges believe public expectations about what the law is, or should be, are particularly relevant.<sup>660</sup> While adjudicating on an application for a periodic review of a detention order under the *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), a Queensland Supreme Court judge said he had ‘decided the case on the basis that public expectations are irrelevant’. This was an apparent response to a public statement by the then Premier, that it was time the courts took into account public expectations in deciding these applications.<sup>661</sup> However, it is generally agreed that for law to be regarded as good law, it must in some sense represent the social consensus.<sup>662</sup> It is also relevant, because public opinion is linked with public confidence in the criminal justice system and critical public institutions.<sup>663</sup> Secondly, it is widely recognised that the judiciary, as well as policy makers, should have regard to informed public opinion and, thirdly, the public has become a key factor in shaping penal policy.<sup>664</sup> The question is to what extent Parliament, and the judiciary, should consider public opinion when carrying out their judicial functions?

---

<sup>659</sup> Bronitt and McSherry, above n 57, 64.

<sup>660</sup> See *Attorney-General for the State of Queensland v Hynds & Anor (No 3)* [2012] QSC 318 (Fryberg J).

<sup>661</sup> Ibid.

<sup>662</sup> James Silvey, ‘The Criminal Law and Public Opinion’ [1961] *Criminal Law Review* 330, 349.

<sup>663</sup> David Indermaur and Lynne Roberts, ‘Confidence in the criminal justice system, (2009) 387 *Trends and Issues in Criminal Justice*, 1.

<sup>664</sup> Julian V Roberts and Mike Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005) 159-60.

## 5.2 Sentencing and Public Opinion

In regards to sentencing, Shute concluded that courts should not totally ignore community values, nor however, should judges of first instance attempt to incorporate public opinion into their sentencing deliberations.<sup>665</sup> It is difficult, however, to accurately state who, or what, the community are at any given time, let alone ascertain what they think of, or expect, of the law, in terms of specific issues. This was noted by Paul Robinson and John Darley, who undertook an empirical study that revealed significant discrepancies concerning public opinion about criminal responsibility and legal doctrine.<sup>666</sup> For example, in the area of self-defence, public opinion was extremely supportive of ‘self-help remedies’, far in excess of those permissible under the law.<sup>667</sup> In a year-long project into the current state of knowledge about public opinion on sentencing, the Victorian Sentencing Advisory Council came up with a number of interesting conclusions concerning the public’s opinion on crime and justice.<sup>668</sup> Drawing on research from Australia, the United States, the United Kingdom and Canada, the Council reached a number of consistent opinions, which included:

- People have very little accurate knowledge of crime and the justice system;
- The mass media is the primary source of information on crime and justice issues; and
- When people are given more information, their levels of punitiveness drops dramatically.

A similar study by the Australian Institute of Criminology also found that the vast majority of the public have distorted views about the distribution of crime, and the

---

<sup>665</sup> Stephen Shute, ‘The Place of Public Opinion in Sentencing Law’ [1998] *Criminal Law Review*, 465.

<sup>666</sup> See Robinson and Darley, above n 498, 45.

<sup>667</sup> Ibid.

<sup>668</sup> Victorian Sentencing Advisory Council, ‘Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing’ (Report, July 2006) 53; Asher Flynn, ‘Plea-negotiations, prosecutors and discretion: An argument for legal reform’ (2015) *Australian & New Zealand Journal of Criminology* 1-19; Asher Flynn & Kate Fitz-Gibbon, ‘Bargaining With Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post-Law Reform’ (2011) 35 *Melbourne University Law Review* 905.

severity of sentencing.<sup>669</sup> However, a jury sentencing survey conducted in Tasmania found that the majority of jurors, after deliberating on a real life case, were more inclined to suggest a more lenient sentence than the presiding judge imposed.<sup>670</sup>

The difficulties of gauging public opinion were noted by former Australian High Court Chief Justice, Murray Gleeson, when addressing the Judicial Conference of Australia Colloquium in October 2004.<sup>671</sup> While he accepted that judges are expected to know, and be responsive to, community values, he posed a series of questions that are relevant to this discussion on community expectations:

How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Should they develop techniques for obtaining feedback from lawyers or litigants? And what kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with?<sup>672</sup>

While these remarks are related to public expectations about sentencing, they also have resonance with community expectations regarding the judicial system in general, and the seemingly prevailing view is those involved in the system are ‘out of touch’ with the public’s views on crime and justice. The influence of the media cannot be overstated, as their coverage of crime can lead, it is said by sociologists, to a phenomenon known as ‘moral panic’.<sup>673</sup> This phenomenon as described by Stanley Cohen, is where ‘a condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylised and stereotypical fashion by the mass media’.<sup>674</sup>

---

<sup>669</sup> Lynne Roberts and David Indermaur, ‘What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes’ (Australian Institute of Criminology Reports, 27 May, 2009) 101.

<sup>670</sup> Criminology Research Council, ‘Jury Sentencing Survey’, (Report, 2010) 34.

<sup>671</sup> High Court of Australia Chief Justice Murray Gleeson, ‘Out of Touch or Out of Reach?’ (Speech to Judicial Conference of Australia Colloquium, Adelaide 2 October 2004).

<sup>672</sup> Ibid 1.

<sup>673</sup> Stanley Cohen, *Folk Devils and Moral Panics* (Routledge, 3<sup>rd</sup> ed, 2002) 1.

<sup>674</sup> Ibid.



For example, Cohen studied the youth groups known as ‘Mods’ and ‘Rockers’ in Britain in the 1960’s.<sup>675</sup> These groups were types of gang with different styles of dress and lifestyle and, from time to time, would descend on seaside towns in Britain and fight it out. According to Cohen, the media defined the nature of the events as a ‘war’, and cast the two groups into the role of social deviants.<sup>676</sup> The argument went that this branding lead to the ‘deviants’ apparently living up to their reputation. The judiciary responded to this media-inspired panic by increasing punishments for members of those groups, as the public became more anxious about the threat posed by the Mods and Rockers.<sup>677</sup>

In his paper ‘One Punch Can Start Moral Panic’, Liam Burke argues the contents of 90 news items concerning fatal assaults in Queensland during the period 23 September 2006 and 28 February 2009 indicated the presence of moral panic.<sup>678</sup> This began when a 15-year-old-boy was fatally assaulted by a 16-year-old boy outside an 18<sup>th</sup> birthday party in Brisbane.<sup>679</sup> Moral panic followed, according to Burke, because it was held out to represent the worst aspect of modern youth behaviour.<sup>680</sup> It was also fuelled by judicial comments, with Justice Duncan McMeekin quoted as saying, ‘there seems to be an escalation in violence, with young men getting drunk in bars and fighting, and there are numerous media reports about it’.<sup>681</sup>

As Burke pointed out, Australian Bureau of Statistics data proves that these predictions and claims of patterns are disproportionate to reality.<sup>682</sup> Fatal assaults only account for a small percentage of deaths, representing, in 2007 for example, only 0.1% of all registered deaths in Australia, and furthermore, that numbers of fatal assaults have

---

<sup>675</sup> Ibid.

<sup>676</sup> Ibid 14.

<sup>677</sup> Dennis Howitt, *Crime, The Media and the Law* (Wiley, 1998) 26; See also, Murray Lee, *Fear of Crime: Criminology and the Politics of Anxiety* ( Routledge, 2013)

<sup>678</sup> Liam Burke, ‘One Punch Can Start Moral Panic: An Analysis of News Items About Fatal Assaults In Queensland between 23 September and 28 February 2009’ (2010) 10 (1) *Queensland University of Technology Law Journal* 87.

<sup>679</sup> Ibid 88.

<sup>680</sup> Ibid.

<sup>681</sup> Bruce McKean, ‘Mark’s Parents Vow to Spread Word that One Punch Can Kill’, *The Daily Mercury* (Hobart), 21 February 2009, 7.

<sup>682</sup> Burke, above n 642, 97.

historically been decreasing.<sup>683</sup> On the other hand, more recently, trauma doctors and neurosurgeons spoke to a television current affairs program and said that while they are not necessarily seeing more assaults, the cases are much more severe.<sup>684</sup> They claim that many emergency hospital units across the country are at capacity on weekends with alcohol-related activities.

### 5.3 Public Depictions of Violence

Another reason for public concern is the comparatively new phenomenon of Closed Circuit Television footage of violent incidents outside trouble spots such as pubs and night clubs. These are often used by television stations to illustrate news reports, which in turn leads to a perception of increased violence. Furthermore, the ubiquitous mobile phones are also often employed by bystanders, who pass on the graphic footage to the media, usually for a fee. However, it must be said, that this footage can be helpful to courts in determining much more of the reality of incidents than mere words from eye-witnesses alone.

Public discussion surrounding youth violence has also led to concern over the apparently successful use of accident and provocation excuses, which was regarded as typical of a justice system that failed to punish offenders. The reaction of the families of two young men who died after being punched were typical of comments made at the time. In a written statement they said:

‘The law, particularly provisions pertaining to accident, seem unfairly weighted in favour of the accused. It appears to be OK for people to go around and hit someone as long as they say “I’m sorry it was an accident, I didn’t believe death would be the consequence of what I did”’.<sup>685</sup>

Of course, this statement is not an accurate statement of what the law is, yet it was never corrected by the media. As noted previously, these incidents and the media reaction which followed, were the catalyst for the government of the day’s decision to instruct the QLRC to review the excuse of accident and provocation. To some extent, the

---

<sup>683</sup> Australian Bureau of Statistics, ‘Causes of Death’ (Australia 200 ABS Cat No 3303.0, 2009) 78.

<sup>684</sup> ABC TV, ‘Punch Drunk’, *Four Corners*, 25 February 2013 (Janine Cohen).  
<http://www.abc.net.au/4corners/stories/2013/02/25/3695353.htm>.

<sup>685</sup> Leanne Edminstone and Jodie Munro O’Brien, ‘Families Robbed – Voice of the Victim ‘Lost in Legal System’, *The Courier Mail* (Brisbane), 2 May 2007, 16.

Queensland Government's decision to instruct the QLRC to conduct a review, was a manifestation of the growth in twentieth century politics of 'single issue' or pressure groups. According to Horder, the influence of these groups can be detected in more than one legislative change or law reform proposal of recent years in the United Kingdom that has, or would have, involved an erosion of the authority or scope of the common law homicide offences.<sup>686</sup>

It is interesting to note, that since the report and its decision to leave the excuse of accident untouched were released, the media furore reduced for a considerable time.<sup>687</sup> For example, in August 2012 the acquittal of a Bundaberg man charged with manslaughter for killing a man with a single punch to the head, attracted little media attention;<sup>688</sup> as did the upholding of an appeal for a Brisbane man convicted in 2012 of manslaughter, following a one punch killing.<sup>689</sup> This was despite the fact that 'accident' (as it was then defined) was a live issue in both cases.

It also should be noted that the public are not adverse to all forms of violence that involve a punch. A Gold Coast busker, who was filmed punching a 'drunken pest' in a mall, was regarded as a hero.<sup>690</sup> The incident, captured on a mobile phone by a bystander, went 'viral' on YouTube, with the vast majority of respondents to the footage applauding the busker's actions, claiming the 'pest' deserved the treatment he received. The punch may be described as moderate in its force, yet it snapped the young man's head back and could easily have resulted in a fall on the hard surface. One wonders what the public's reaction would have been had the man suffered a serious

---

<sup>686</sup> Jeremy Horder, 'Homicide Reform and the Changing Character of Legal Thought', in C. Clarkson, & S. Cunningham, (eds) *Criminal Liability for Non-Aggressive Death*, (Ashgate Publishing Group, 2008), 29.

<sup>687</sup> Queensland Law Reform Commission Report, *A review of the excuse of accident and the defence of provocation* 64 (2008).

<sup>688</sup> Vanessa Marsh, 'Manslaughter accused not guilty', *Bundaberg News Mail* (online), 23 August 2012. <http://www.news-mail.com.au/story/2012/08/23/manslaughter-accused-not-guilty>.

<sup>689</sup> *R v Hung* [2012] QCA 341. *Hung* was subsequently convicted at a re-trial in 2013.

<sup>690</sup> Jeremy Pierce, 'Gold Coast busker who punched a heckler has been counselled by Surfers Paradise Officials', *Courier-Mail* (online), 18 March 2013, <http://www.couriermail.com.au/news/queensland/gold-coast-busker-who-punched-a-heckler-has-been-counselled-by-surfers-paradise-officials/story-e6freoof-122659989455>

brain injury and died? Perhaps, an accident, but would there have been the same level of sympathy for the busker, if death had been the outcome?

The terms of reference for the QLRC required it to have particular regard as to whether the current excuse of ‘accident’ reflected community expectations.<sup>691</sup> However, the Commission only received a total of six submissions from the public, which hardly suggests widespread community concern regarding the issue.

## 5.4 Public Opinion Survey

A public opinion survey carried out in England and Wales also highlighted the difficulties in accurately predicting precisely what the community perceives as justice.<sup>692</sup> Respondents were asked to consider the following eight hypothetical scenarios:

- *Burglary*  
A burglar was disturbed by the owner of the house, a 25-year-old woman, and panicked. He picked up an ashtray, which was near at hand, and hit her over the head with it. She died of her injuries.
- *Terminally ill woman*  
A woman was terminally ill and in great pain. She had been begging her husband to ‘put her out of her misery’ for months. Eventually, he gave in to her request, and suffocated her while she was asleep.
- *Woman drowning*  
A young woman was walking her dog by a lake when she slipped and fell into the water. A passer-by saw her drowning in the lake. Although he could swim, instead of trying to save her, he walked by and she drowned.
- *Man and woman arguing*  
A man and a woman were arguing about who was first in the queue at the supermarket. He gently pushed her, and she unexpectedly tripped and bumped her head against a wall. She had an unusually thin skull and died from her injuries.
- *Mountain climbers*  
Two mountain climbers were roped together. One of them slipped and fell. The other tried to hold on to the rocks for the both of them, but he knew that if he did

---

<sup>691</sup> Queensland Law Reform Commission Report, above n 1, 2.

<sup>692</sup> Mitchell, above n 78, ‘453.

not cut the rope they would both die. To save himself, he cut himself loose, knowing that the other climber would fall to his death.

- *Battered spouse*

A woman had been physically and sexually abused by her husband for three years. He came home one evening and started hitting her again. She couldn't stand any more abuse, so she waited until her husband was sleeping and then hit him over the head with a saucepan, killing him.

- *Two men arguing at work*

Two men were having a heated argument at work which developed into a fight. One of them picked up a screwdriver and lunged at the other. Fearing that he would otherwise be stabbed, the unarmed man grabbed a spanner, and in self-defence, hit the other man over the head with it, killing him.

- *Killer threatened with his own life*

A group of terrorists threatened a man's own life if he did not agree to kill a local businessman. The man was told by the terrorists he had one week in which to kill the businessman, and that if he went to the police, he would be shot. Scared for his own life, the man could see no alternative and killed the businessman.<sup>693</sup>

Respondents were then asked, among other things, to rank the scenarios in order of seriousness, and to give their reasons for the rating. The burglary scenario was perceived as the most serious homicide, followed by the 'Killer threatened with his own life' scenario, and third was the woman drowning.<sup>694</sup> The man and the woman arguing, or thin skull scenario, was rated fifth in order of seriousness, rating only slightly higher than the terminally ill woman scenario, and very similar to the case of the mountain climbers. According to the respondents' reasons, the mountain climbers' example was rated lowly largely because the killing was perceived as accidental. More than sixty per cent said the killer bore no fault as the killing was unpremeditated, or death was unforeseeable.<sup>695</sup>

Mitchell believed this latter observation was particularly interesting, in view of the common law's view that a person's foresight of the consequences of his or her action is

---

<sup>693</sup> Barry Mitchell, 'Public Perceptions of Homicide and Criminal Justice', (1998) 38 (3) *British Journal of Criminology* 457.

<sup>694</sup> Ibid 458.

<sup>695</sup> Ibid 465.

evidence of intention.<sup>696</sup> Although conceding the matter required further examination, Mitchell was of the view that respondents may not regard the thin skulls and mountain climbers' homicides as even crimes, but would regard the higher rated scenarios as offences.<sup>697</sup> In essence, it represents the kind of homicide which the Law Commission recommended should cease to be treated as meriting a conviction for manslaughter, largely on the ground that the killer lacks sufficient moral culpability.<sup>698</sup> However, what the study demonstrates above all else, is that when apprised of the facts of an accidental killing, people are less likely to be as punitive as the media and some single-issue interest groups are likely to give them credit for.

## 5.5 Public Perceptions of Crime

A good example of this finding is illustrated in the Irish case, *The People (DPP) v Byrne*,<sup>699</sup> where the accused was tried for the manslaughter of his sister's boyfriend, having punched him once on the face at a family wedding, causing him to fall and hit the back of his head on the ground. The State Pathologist gave evidence that the deceased died from respiratory distress caused by head injuries he received from a 'mild punch' and the subsequent fall to the ground. The jury unanimously found the accused not guilty of manslaughter. The courts too, on occasions, have delivered merciful verdicts. For instance, in *Mallet's* case, a manslaughter sentence of 18 months imprisonment for an accidental death resulting from a minor assault was, on appeal, suspended for two years as 'an act of mercy'.<sup>700</sup> As was noted in commentary on the case, the proper approach to sentencing in manslaughter cases of this kind, where death is the wholly accidental result of an unlawful act of a relatively trivial nature, is to sentence the offender on the basis of the acts he or she did and the consequences he or she intended.<sup>701</sup>

---

<sup>696</sup> Ibid.

<sup>697</sup> Ibid 469.

<sup>698</sup> Law Commission for England and Wales, 'Legislating the Criminal Code: Involuntary Manslaughter', (No 237, Part III 1996) 1.7.

<sup>699</sup> See 'Wicklow man acquitted of manslaughter of his sister's boyfriend', *The Irish Times* (Dublin), 6 July 2004, 9.

<sup>700</sup> *R v Mallet* [1972] (April) 12 Crim LR 260.

<sup>701</sup> David Thomas, Case and Comment, *Criminal Law Review* (1972) 261.

It is salient therefore to briefly consider the influence the media has on people's perceptions of crime, and how it influences policy. Key findings from an Australian study concerning perceptions of crime showed that the media provide the major source of information for most members of the public about crime and justice.<sup>702</sup> The survey also found that a large majority of the public have inaccurate views about the occurrence of crime and the severity of sentencing.<sup>703</sup> Furthermore, the survey revealed that the public overestimates the proportion of crime that involves violence, and underestimates the proportion of charged persons who go on to be convicted and imprisoned.<sup>704</sup> This is certainly true with the excuse of 'accident' where, as previously stated in this thesis, the excuse has rarely been successful in criminal trials, with the vast majority of accused who plead this defence going on to be convicted and gaoled. There is little doubt that the media publishes not only information about crime, but also suggestions about how its readers should view and respond to crime.<sup>705</sup> The manner in which crime is often portrayed by the news media suggests that crime is more prevalent and threatening and requires harsher punishment in response.<sup>706</sup> The rationale appears to be focused on the demand for public condemnation, rather than on the more laudable possibility of educating offenders to comply with the law in future.

According to Bronitt and McSherry, the expansion of police powers in New South Wales was a political response to the problems of 'gangs' and 'knives on the streets'.<sup>707</sup> It was neither based on empirical nor public policy research on the incidence of crime and disorder, or the effectiveness of proposed crime prevention strategies and legal

---

<sup>702</sup> Lynne Roberts and David Indermaur, 'What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes' (Australian Institute of Criminology Research and Policy Series 101, 2007) 9; Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results from a National Australia Survey On Public Opinions Towards Sentencing' (2012) 45(1) *Australia New Zealand Journal of Criminology* 1, 45.

<sup>703</sup> Ibid.

<sup>704</sup> Ibid.

<sup>705</sup> Leanne Edminstone and Jodie Munro O'Brien, 'Families Robbed – Voice of the Victim Lost in Legal System', *The Courier-Mail* (Brisbane), 2 May 2007.

<sup>706</sup> Rachel Olding, 'Pressure Grows for Tougher Sentences' *The Sydney Morning Herald*, 4 January 2014, <http://www.smh.com.au/nsw/pressure-grows-for-tougher-sentences-20140103-309o2.html>.

<sup>707</sup> Bronitt and McSherry, above n 57, 792.

reforms.<sup>708</sup> Beale offers two explanations of how the media are able to cause the public to perceive crime to be more serious than it actually is. First, by agenda setting, which involves directing the public's attention to certain issues. The second is by priming, which describes the media's ability to affect the criteria by which people judge public policies and public officials.<sup>709</sup>

Most of the literature on media effects, and the policies of crime and justice, come from the United States, with studies from other countries also generally conforming to these general findings.<sup>710</sup> That is, that the news media focus primarily on stories about dramatic, unusual and violent crime.<sup>711</sup> It is not surprising, therefore, that studies of public perceptions of crime reveal a picture of crime that is not only concerned with these types of crime, but also overestimates their prevalence and the chances of victimisation. This milieu leads to a development of a response known as 'penal populism' or 'populist punitiveness' as Professor Anthony Bottoms coined it, where the electoral advantage of a policy takes precedence over its penal effectiveness.<sup>712</sup> According to Freiberg, Bottoms used the phrase not to refer to public opinion *per se*, but rather 'the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance'.<sup>713</sup> As Roberts *et al* note, while it would be naive to complain about politicians being responsive to public opinion, there is a danger in promoting policies which are electorally attractive but are unfair, ineffective or at odds with a true reading of public opinion.<sup>714</sup>

---

<sup>708</sup> Ibid.

<sup>709</sup> Sara S Beale, 'The news media's influence on criminal justice policy: How market-driven news promotes punitiveness', (2006) 48 (2) *William and Mary Law Review* 397.

<sup>710</sup> Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003) 76.

<sup>711</sup> Ibid 78.

<sup>712</sup> Anthony E Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C. Clark and R. Morgan (eds), *The Politics of Sentencing Reform*, (Clarendon Press, 1995) 39.

<sup>713</sup> Arie Freiberg and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008) 3.

<sup>714</sup> Ibid 5.



Historically, in the United States, the Nixon administration is usually credited with manipulating crime issues to achieve political success.<sup>715</sup> Since then, politicians have continued to use ‘tough on crime’ campaigns to their advantage. As one criminologist has written, no matter which side of the political spectrum, candidates have discovered that to win office and be re-elected, they must stay the course with punitive control measures.<sup>716</sup>

According to some, the explanation for the rise in punitive policies is a growing public anxiety towards a seemingly rapid and bewildering convergence of social, cultural, economic, technological and ecological changes in modern society.<sup>717</sup> They argue that the influence of the expert in criminal justice policy has declined, and been replaced by the voice of the public. Research and criminological knowledge has been downgraded, and in its place is a new deference to the authority of ‘the people’, ‘common sense’ and ‘getting it back to basics’.<sup>718</sup>

David Garland, in his seminal work *The Culture of Control*, writes that legislatures have repeatedly adopted a punitive ‘law and order’ stance, disregarding evidence that crime does not readily respond to severe sentences, or new police powers, or a greater use of imprisonment.<sup>719</sup> He argues that political expediency not infrequently dominates the motivations of the key players:

Their most pressing concern is to do something decisive, to respond with immediate effect to public outrage, to demonstrate that the state is in control and is willing to use its powers to uphold ‘law and order’ and to protect the law-abiding public.<sup>720</sup>

---

<sup>715</sup> Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (Oxford University Press, 1997).

<sup>716</sup> Valerie J Callanan, *Feeding the Fear of crime: Crime-Related Media and Support for Three Strikes* (LFB, 2004) 6.

<sup>717</sup> Roberts et al, above n 671, 68-75.

<sup>718</sup> David Garland, *The Culture of Control* (Oxford University Press, 2001); Katja F Aas’ *Sentencing in the age of information: from Faust to MacIntosh* (Glasshouse Press, 2005).

<sup>719</sup> David Garland, *The Culture of Control* (OUP, 2001) 132.

<sup>720</sup> Ibid 133-134.

## 5.6 A 'Fearful Society'

In effect, lawmaking becomes a matter of retaliatory gestures intended to reassure a worried public. More concerning is that, according to at least one judge, the consequence of this seemingly 'fearful society' has led to judges becoming fearful more than they care to admit; not of those they judge but the fear of criticism from the media for having gone too 'soft' in sentencing.<sup>721</sup> Certainly, in the case of the media hype concerning the excuse of 'accident' in Queensland, the Government of the day was quick to respond with its direction to the QLRC to conduct a review into its effectiveness.<sup>722</sup> This is notwithstanding its ultimate decision to accept the recommendation of the QLRC's final report and leave the law untouched.<sup>723</sup> In particular, the government upheld the QLRC's recommendation not to introduce a new offence of unlawful assault causing death, to cover the 'one punch' killer scenario.

Interestingly in Western Australia, their Law Reform Commission's review of homicide laws came to the same conclusion as its Queensland counterpart.<sup>724</sup> However, the Western Australian government rejected their Commission's recommendation, and in 2008 introduced a new offence of unlawful assault causing death.<sup>725</sup> According to former Attorney-General, Jim McGinty, it was to 'ensure people who caused a death by assaulting another were held accountable for their actions'.<sup>726</sup> The impetus for the change was apparent community concern over the acquittal for manslaughter of two accused in 'one punch' killings.<sup>727</sup> As the jury in those two cases were not presented with alternative verdicts, the new offence was said to cover an apparent loophole in the law that allowed those responsible for a killing to walk free. Unfortunately, as will be demonstrated in the next chapter, the new offence driven by apparent community

---

<sup>721</sup> Justice Ian G Harrison, , Sentencing Conference Speech (Speech delivered at The Great Hall, University House, Australian National University, Canberra, Friday 8 February 2008), <http://www.supremecourt.justice.nsw.gov.au/Documents/harrison080208.pdf>

<sup>722</sup> Queensland Law Reform Commission Report, above n 1.

<sup>723</sup> Ibid, 207.

<sup>724</sup> Western Australia Law Reform Commission, above n 260, 91.

<sup>725</sup> *Criminal Code 1913* (WA) s 281.

<sup>726</sup> Attorney-General Jim McGinty, 'New Law to deal with 'one punch' deaths' (Ministerial Media Statement 14 March 2008). <https://www.mediastatements.wa.gov.au/Pages/Carpenter/2008/03/New-laws-to-deal-with-'one-punch'-deaths.aspx>

<sup>727</sup> Ibid.

concern or penal populism has led to what is colloquially known as ‘unintended consequences’.

It must be noted however, the Western Australian experience did not deter the New South Wales government, which adopted similar legislation with an even higher maximum penalty.<sup>728</sup> The new ‘one punch’ law will carry a maximum penalty of twenty years, which is double the penalty imposed in Western Australia. This legislation was in response to a case where a youth who fatally attacked another youth, pleaded guilty to manslaughter and received a maximum sentence of six years, with a four year non-parole period.<sup>729</sup> Immediately after sentencing, the New South Wales Attorney-General, Greg Smith, announced he would seek an appeal against the sentence and three days later he proposed the new ‘one punch’ laws.<sup>730</sup> The announcements were made following reports that the deceased’s parents had launched an online petition, calling for the state government to change ‘outdated’ laws, and to explore the creation of an offence that ‘deals specifically with the death of a person as a result of a violent/criminal act but does not reach the necessary threshold to establish murder’.<sup>731</sup> Other media weighed in to the debate, universally condemning the sentence imposed on the defendant.<sup>732</sup>

---

<sup>728</sup> Anna Patty ‘Proposed laws will give 20 years for ‘one-punch’ killings’, *Sydney Morning Herald* (online), 13 November 2013, <http://www.smh.com.au/nsw/proposed-laws-will-give-20-years-for-onepunch-killings-20131112-2xenc.html>.

<sup>729</sup> Paul Bibby, ‘Kieran Loveridge jailed for four years for killing Thomas Kelly’, *Sydney Morning Herald* (online), 8 November 2013, <http://www.smh.com.au/nsw/kieran-loveridge-jailed-for-four-years-for-killing-thomas-kelly-20131108-2x5j5.html>.

<sup>730</sup> See, Patty, above n 686, <http://www.smh.com.au/nsw/proposed-laws-will-give-20-years-for-onepunch-killings-20131112-2xenc.html>. The appeal against sentence was upheld with the NSW Court of Criminal Appeal doubling the offender’s sentence: *R v Loveridge* [2014] NSWCCA 120; Julia Quilter, ‘One-Punch Laws, Mandatory Minimums and ‘Alcohol-Fuelled’ as an Aggravating Factor: Implications for NSW Criminal Law’ (2014) 3(1) *Crime Justice Journal* 81-106.

<sup>731</sup> Lisa Davies, ‘Thomas Kelly’s parents petition Premier Barry O’Farrell for law review’, *Sydney Morning Herald* (online), 11 November 2013, <http://www.smh.com.au/nsw/thomas-kellys-parents-petition-premier-barry-ofarrell-for-law-review-20131110-2xa2y.html>.

<sup>732</sup> A typical example is Paul Sheehan *Sydney Morning Herald* (online), 11 November 2013 ‘Judge with no sense of the real world’, <http://www.smh.com.au/comment/judge-with-no-sense-of-the-real-world-20131110-2x9zp.html>.

The government did not seek independent legal advice from bodies, such as the Law Reform Commission to review whether existing laws need to be changed. Nor has the Attorney-General informed the public why a 20 year maximum sentence for an unlawful assault causing death will result in higher sentences than under the current manslaughter laws, which allow for a maximum sentence of 25 years. Greens justice spokesman, David Shoebridge, has described the new laws as little more than a ‘knee-jerk’ response to an alcohol-fuelled tragedy.<sup>733</sup>

## 5.7 Juries

What is often forgotten in these discussions is the influence the jury system has on the criminal justice system. Juries have been used in many legal systems and can be dated back to at least Periclean Athens in the 5<sup>th</sup> century BC, ancient Rome and ancient Babylon although the determination of guilt based on a consideration of objective evidence was a much later development.<sup>734</sup> Trial by jury was established in Queensland at the time of its separation from New South Wales in 1859.<sup>735</sup> Juries reflect the community, and their existence is of particular importance in a criminal trial.

In *United States ex rel McCann & Adams*,<sup>736</sup> Learned Hand J said, when discussing why the jury has survived for so long, that if they (juries) acquit:

...their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of the law, tempering its rigour by the mollifying influence of current ethical conventions.

In *Kingswell v The Queen*, Deane J said trial by jury brings important practical benefits to the administration of criminal justice:

A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the

---

<sup>733</sup> Patty, above n 686, <http://www.smh.com.au/nsw/proposed-laws-will-give-20-years-for-onepunch-killings-20131112-2xenc.html>.

<sup>734</sup> Robin Lane Fox, *The Classical World* (Penguin Press, 2006) 132, 145; Paul Woodruff, *First Democracy* (OUP, 2006) 16, 32-5, 50, 109, 119, 123-4, 225.

<sup>735</sup> Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 6.

<sup>736</sup> *McCann & Adams* [1942]126 F (2d) 774, 775.

substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.<sup>737</sup>

In *Mraz v R*, Justice Fullagar referred to:

The long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is in the eye of the law a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.<sup>738</sup>

That, of course, means not just the right to a trial, but a *fair* trial.

The significance of a fair trial has been characterised in numerous High Court judgments, as the ‘central thesis of the administration of criminal justice’;<sup>739</sup> as ‘the central prescript of our criminal law’;<sup>740</sup> as a ‘fundamental element’;<sup>741</sup> and as an ‘over-riding requirement’.<sup>742</sup> It is not within the ambit of this thesis to consider the philosophy of the concept of fairness. However, as Deane J explained it in *Jago*:<sup>743</sup>

‘putting to one side causes of actual or ostensible bias, the identification of what does and does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involved an undesirably but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experiences’.<sup>744</sup>

Jurors are given three principal tasks:

---

<sup>737</sup> *Kingswell v The Queen* (1985) 159 CLR 264, 300-301 (Deane J).

<sup>738</sup> *Mraz v R* (1956) 93 CLR 493, 514.

<sup>739</sup> *McKinney v The Queen* (1991) 171 CLR 468.

<sup>740</sup> *Jago v The District Court of NSW* (1989) 168 CLR 23, 56-57 (Deane J).

<sup>741</sup> *Dietrich v The Queen* (1992) 177 CLR 29 (Mason CJJ and McHugh J).

<sup>742</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 330 (Deane J).

<sup>743</sup> *Jago v The District Court of NSW* (1989) 168 CLR 23, 57.

<sup>744</sup> *Jago v The District Court of NSW* (1989) 168 CLR 23, 57.

- They must assess the evidence and come to any necessary resolution of disputed facts impartially and free from influences from outside the courtroom.
- They must follow the judge's instructions on the law.
- They must fairly apply the law to the evidence as instructed to reach their verdict.<sup>745</sup>

Whether the issues are understood by juries where the excuse of an unintentional and unforeseeable consequence is raised, is a moot point. For example, the objective/subjective test of s 23(1) (b) would seem to be an important safeguard against strict liability, but not all judges are satisfied with the directions concerning foreseeability.<sup>746</sup>

As noted in the previous chapter, a former Justice of the Supreme Court, the Honourable J B Thomas in a submission to the QLRC said that the direction about the foreseeability test was complex, and difficult to explain to a jury<sup>747</sup> as it called upon juries to apply a complex test. In the case of a 'one punch' killing, he said juries must consider the degree of force and risk to which the criminal act might expose the victim, whether the accused would have foreseen the consequence, and whether the ordinary person in the shoes of the accused would have foreseen it.<sup>748</sup> If juries are confused about a judge's directions, there is a danger the outcome of their verdict may not be the result of what is described above as a fair trial. How much more complex would the directions be if alternative offences to manslaughter, such as assault occasioning bodily harm causing death or unlawful assault causing death, are preferred against an accused in a low level violence case? Furthermore, as the QLRC noted, there is a very real risk that a jury faced with the choice between manslaughter and a lesser offence, will compromise and convict of the lesser offence.<sup>749</sup>

---

<sup>745</sup> See, for example, Queensland Law Reform Commission, *A Review of Jury Directions*, Report 66 (2009)

<sup>746</sup> *Queensland Supreme and District Courts Benchbook*, 'Accident s23 (1) (b) No. 75 available at Queensland Courts, [http://www.courts.qld.gov.au/data/assets/pdf\\_file/0008/86084/sd-bb-75-accident.pdf](http://www.courts.qld.gov.au/data/assets/pdf_file/0008/86084/sd-bb-75-accident.pdf).

<sup>747</sup> Queensland Law Reform Commission Report, above n 1, 141.

<sup>748</sup> Ibid.

<sup>749</sup> Ibid 206.

This was the concern of the then Chief Justice of Queensland, Paul De Jersey, who acknowledged the prosecution's discretion to charge a 'one punch' killer with grievous bodily harm, or another lesser charge as an alternative count on an indictment for homicide, but generally does not do so.<sup>750</sup> He presumed the reason for these decisions was to avoid offering a jury what might be considered a 'soft option', so as to compel the jury to confront the serious charge head-on. Yet the result, in cases where accident is the only issue, is that the accused may walk free and unpunished, even though in truth, guilty of some other offence.<sup>751</sup> Although s 23 can, in appropriate cases, be pleaded as an excuse to doing grievous bodily harm, the Chief Justice said common sense suggests a jury would be less likely to conclude that serious injury was not reasonably foreseeable, even if death was, and convict. If so, there would be some sanction for the conduct.<sup>752</sup>

On the other hand, where self-defence is proved, an accused is entitled to acquittal of homicide, or a lesser account on the same indictment. Sometimes though, for fair labelling reasons, manslaughter may be the only charge that can be brought in an unlawful killing. For instance, where the pilot of a hot air balloon who was involved in a collision with another hot air balloon which caused the death of 13 people.<sup>753</sup> The defendant was charged with 13 counts of manslaughter and, in the alternative, one count of a dangerous act. He was acquitted of manslaughter, but convicted of doing a dangerous act. However, as Clarkson has pointed out, it seems inappropriate, and amounts to false labelling to then convict the defendant of the dangerous act that was not sufficiently dangerous for manslaughter.<sup>754</sup>

These conundrums illustrate the difficulties that face lawmakers when striving to secure a reasonable balance between the interests of victims and accused persons. For its part, the Commission suggested if, against its recommendation, a new offence of unlawful assault occasioning death is created, that offence is not made a statutory alternative to

---

<sup>750</sup> De Jersey, above n 229, 70.

<sup>751</sup> Ibid.

<sup>752</sup> Ibid.

<sup>753</sup> *R v Sandby* [1993] 117 FLR 218.

<sup>754</sup> Clarkson, above n 559, 139.

manslaughter, but preferred only in cases where the prosecution considers that it is the appropriate charge having regards to the circumstances of the case.<sup>755</sup> (A fuller explanation of the alternative offences that are available, is explored in the next chapter).

On the other side of the ledger, there is also the danger that defendants may feel pressured into pleading guilty to lesser offences, rather than facing the more serious charges. That is, they will give up their right to a fair trial on the more serious charge, where they may have an arguable defence and the chance of an acquittal, for the less risky option of an early plea and a lesser sentence. This would not seem to be in the best interests of justice, and may result in an ethical dilemma for lawyers.<sup>756</sup> Furthermore, it also highlights the problems associated with conferring too much discretion on those administering the criminal justice system.

Nevertheless, juries, based as they are on community representatives, have an important role to play in the criminal process, and every effort should be made to ensure that with directions on matters of law, they should be as understandable as possible. This is because there is a danger that if jurors do not understand the judge's instruction, 'there can be no assurance that the verdict represents a finding by the jury under the law and upon the evidence presented'.<sup>757</sup> Ogloff goes on to refer to a number of research studies, dating back to the 1970's, which were designed to test jurors' comprehension of judges' law instructions. In some studies, the participants saw and heard video-tape instructions, in others they received them in writing: in some, instructions were as given, in others they were rewritten with the intention that they should be more easily comprehensible. The studies found that the comprehension rate was higher with video-taped instructions than with merely written instructions, and higher with the redrafted instructions than with the original. However, even the 'hit rate' of comprehension appears to have been disturbingly low (although no actual figures or percentages are given).<sup>758</sup>

---

<sup>755</sup> Queensland Law Reform Commission Report, above n 1, 206.

<sup>756</sup> Neil Watt, 'Pleading a Lie', (2009) 29 (8) *Proctor* 38.

<sup>757</sup> James RP Ogloff, 'Judicial Instructions and Jury: a comparison of Alternative Strategies', (Final Paper, British Columbia Law Foundation, 1998) 36.

<sup>758</sup> *Ibid* 37.



## 5.8 Jury Comprehension Problems

The problems of jury comprehension has also been recognised in Victoria, where new laws to make the directions given to juries' shorter and less complex, are being introduced to the Victorian Parliament, based on the recommendations of the Victorian Law Reform Commission's 2009 report, *Jury Directions*, as well as those of other legal bodies. According to the Victorian government, the reforms will allow judges to answer juries' questions about the meaning of 'proof beyond reasonable doubt', simplify the way that judges explain to juries what they need to decide in reaching their verdict, and ensure that judges summarise the evidence succinctly.<sup>759</sup> It is anticipated that the bill will make criminal trials shorter, and reduce the number of appeals. Attorney-General Robert Clark said: 'Complex jury directions lead to unnecessary appeals and retrials that are a significant cause of delay in the court system, as well as unnecessary trauma and stress for victims, witnesses and others'. These concerns were echoed in a recent speech by the Chief Justice of New South Wales, Justice Bathurst, where he said the increasing complexity of jury trials makes it extremely difficult for the jury system to function effectively.<sup>760</sup> He said this was not a criticism of the capacity of jurors, but rather a consequence of the difficulty of explaining to a jury, and having a jury understand in a limited period of time, complex factual issues, including those involving technical, financial and scientific matters.<sup>761</sup>

However, while most judges in the criminal jurisdiction believe the jury nearly always gets it right, there are occasions when seemingly 'merciful verdicts', seemingly at odds with the evidence, are brought down. This may not necessarily mean that jurors have 'got it wrong', as it were, just that they have arrived at their decision by a different route. A recent example, as noted earlier, occurred in Bundaberg, where a 47-year-old man was tried for manslaughter, after knocking his 66-year-old neighbour unconscious with a single punch. The neighbour died in hospital from a subdural haemorrhage, a

---

<sup>759</sup> Department of Justice (Vic) 'New juries direction bill introduced into Parliament' (Media release issued 13 December 2012).

<sup>760</sup> Chief Justice (NSW) Tom Bathurst, 'Community Participation in Criminal Justice' (Speech delivered at the opening of Law Term Dinner, Sydney, 30 January 2012).

<sup>761</sup> Ibid.

brain injury where excess blood places pressure on the brain.<sup>762</sup> According to the accused's evidence, the pair were involved in a heated discussion when the victim started throwing what were described as 'pathetic' punches at the accused from the seat of his car. The situation escalated, ending when the accused threw a single, and in his Counsel's words, low-level punch at the victim, knocking him out and causing the injury which eventually killed him.<sup>763</sup>

On these facts, one might assume an inevitable and obvious verdict of guilty might be forthcoming. Particularly, as self-defence would not seem to have been a major issue, because, according to the evidence, the victim suffered from poor health and had limited mobility, so the accused could easily have evaded the attack. This was not the case, however, as the jury acquitted the defendant. Therefore, the defendant's excuse that he could not have foreseen that death would result from his low-level punch, and nor would a reasonable person have foreseen it, would appear to have been conclusive as far as the jury were concerned. Although the deceased was portrayed at the trial as an obnoxious person, and perhaps not deserving of sympathy, it does seem the verdict was a merciful one, given the age and health disparity between the two assailants.

Cases do arise where verdicts returned by a jury represent 'an affront to logic and common sense', and suggest a compromise in the performance of the jury's duty.<sup>764</sup> But, 'if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted'.<sup>765</sup> In fairness to the judiciary, sentencing in cases of manslaughter is notoriously difficult, mainly because there may be no certainty about the factual basis on which the defendant was convicted. That is because, when the jury merely returns a verdict of guilty of manslaughter, the court is not told the basis on which the jury reached its verdict, making it difficult to be sure of the defendant's

---

<sup>762</sup> Vanessa Marsh, 'Manslaughter accused not guilty', *Bundaberg News Mail* (online), 23 August 2012 <http://www.news-mail.com.au/story/2012/08/23/manslaughter-accused-not-guilty/#guilty>

<sup>763</sup> Ibid.

<sup>764</sup> *MFA v The Queen* (2002) 213 CLR 606. Justices McHugh, Gummow and Kirby discussing *MacKenzie* (1996) 190 CLR 348.

<sup>765</sup> Ibid.

culpability.<sup>766</sup> The Court then has to determine the gravity of the harm caused, that is, the loss of life and the defendant's moral culpability, which in 'one punch' killings may not be that significant. It is salutary to note however, that there does not seem to have been any overturning of jury verdicts on the grounds of perversity, where a lack of foreseeability was a live issue in Queensland cases. This would seem to suggest that juries do not have any apparent difficulty in comprehending a judge's directions on the excuse. Whether this would remain the case where alternative offences are charged, will be canvassed in the next chapter.

## 5.9 Conclusion

While it is generally agreed that good law must, in some sense, represent the social consensus, it does not necessarily mean the law should be held captive to it. This is because it is difficult to accurately state what the community (however it is defined) expects of the law in terms of specific issues at any given time. Although it appears true that people gain their knowledge of the justice system through the media, it does not follow that the media's perception of crime is always accurate, or even informative. This has especially been the case in some of the more sensational reportage of 'one punch' killings where wrongful summations of the law are often replete.<sup>767</sup>

As noted above, the studies that have been carried out, suggest people are not as punitive in their views once they are apprised of the true facts, rather than when they rely simply on the popular press. It would be naïve not to expect lawmakers to be responsive to public opinion, however politicians should be aware that there is a danger in promoting policies which are electorally attractive, but are at odds with a fair justice system. All too often, as some legal commentators have warned, there is a danger electoral populism can upset the reasonable balance that should exist between the interests of victims and accused persons, especially in emotive cases where death arises unexpectedly from one-punch.<sup>768</sup> Judges and juries, it is said, should be left alone to

---

<sup>766</sup> *Jury Act 1995*(Qld) s 70 Confidentiality of jury deliberations

<sup>767</sup> See for example, Cohen, above n 637, 2.

<sup>768</sup> Nicholas Cowdery, *Getting Justice Wrong: Myths Media and Crime* (Allen & Unwin, 2001) 103.

decide cases on the basis of the rule of law and not perceived ‘public expectations’ espoused by some politicians.<sup>769</sup>

Of more importance, in any investigation of the just way to deal with deaths resulting from ‘one punch’, is to look at whether such tragedies can fairly be said to be foreseeable, and therefore avoidable. Furthermore, how much responsibility can be sheeted home to defendants in the other essential elements, such as causation and the importance of the consequences that flow? The next chapter will address the relevance of foreseeability, causation and consequences, as well as the evidential tests of objectivity and subjectivity that best apply for this particular crime.

---

<sup>769</sup> As per Fryberg J in *Attorney-General for the State of Queensland v Hynds & Anor (No 3)* [2012] QSC 318



## 6 *FORESEEABILITY, CAUSATION & CONSEQUENCES*

### 6.1 Introduction

Whether a person can foresee the consequences of their actions, and whether an ordinary person could also have foreseen those consequences, are the central questions when discussing the liability of a ‘one punch’ killer. These questions involve a subjective and objective test, and therefore in the context of this thesis, it is pertinent to discuss the history of the competing arguments involving foreseeability, causation and consequences of actions as they concern criminal law.

One of the law’s most divisive issues is the use of the objective versus subjective test in criminal law. Critics of the objective test claim it jeopardises the doctrine of *mens rea* while supporters argue that it introduces a necessary community standard. It is not the aim of this thesis to reintroduce that argument in its entirety, as this would require a separate thesis. However, it will be argued that the common sense approach is to adopt a hybrid standard, which takes into account the intention and characteristics of a particular defendant at the same time that it provides a normative guide as to the reasonable person.

As Thomas Kuhn, the American physicist, historian and scientific philosopher wrote in his influential book, ‘The Structure of Scientific Revolutions’, competing paradigms are frequently incommensurable.<sup>770</sup> That is, they are competing accounts of reality which cannot be coherently reconciled. Thus, our comprehension of science can never rely on full ‘objectivity’; we must account for subjective perspectives as well. This, I would submit, is equally true of the law.

---

<sup>770</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962).

## 6.2 Foreseeability

Foreseeability is said to be one of the five essential principles relating to causation in homicide.<sup>771</sup> The first principle is that an act or omission must have contributed significantly to the death.<sup>772</sup> The second that an intervening cause may negate causal responsibility.<sup>773</sup> Third, the foreseeability of the victim's death as a result of performing the act or omission relied on, may determine whether that death was causally related to an act or omission.<sup>774</sup> The fourth principle is a 'but for' test may be used to establish a *prima facie* causal link and finally, juries may be invited to use their common sense in determining whether the defendant's act or omission caused the death.<sup>775 776</sup>

It is the third requirement, that 'the foreseeability of the victim's death as a result of performing the act or omission relied on, may determine whether that death was causally related to an act or omission', which is most germane to this thesis.

Section 23 of the Queensland Criminal Code, until it was amended in 2011, stated:

*23 Intention – Motive*

- 25 Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for –
- 26 An act or omission that occurs independently of the exercise of the person's will; or
- 27 An event that occurs by accident.

The first limb of s 23 requires the act to be willed while the second limb relates to events consequent upon the act. This thesis is mainly concerned with the second limb but for the sake of clarity it is appropriate to briefly discuss the first limb: 'An act or omission that occurs independently of the exercise of the person's will'. The requirement of a willed act substantially corresponds with the common law requirement

---

<sup>771</sup> Paul Fairall, *Homicide: The Laws of Australia*, (LexisNexis Butterworths, 2012) 10.1.430.

<sup>772</sup> *Royall v The Queen* (1991) 172 CLR 378 (Brennan J); *Osland v The Queen* (1998) 197 CLR 316.

<sup>773</sup> *R v Pagett* [1983] 76 Cr App R 279.

<sup>774</sup> *Royall v The Queen* [1991] 65 ALJR 451 (Brennan J); *R v Hallett* [1969] SASR 141.

<sup>775</sup> *Royall v The Queen* [1991] 65 ALJR 451 (Brennan J).

<sup>776</sup> *Murray v The Queen* (2002) 211 CLR 193; 76 ALJR 899.

that an offender's act be done with volition or voluntarily.<sup>777</sup> It imports no intention or desire to effect a result by the doing of the act, but merely a choice, consciously made, to do an act of the kind done.<sup>778</sup>

The question of voluntariness often arises when the condition known as 'automatism' is raised as a defence for example, where a firearm has discharged and the jury is invited to consider the possibility that the pulling of the trigger was not a willed act by the defendant. The term automatism is no more than a modern catch-phrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person.<sup>779</sup> It only relates to sane automatism because where insanity is a live issue as a matter of law it must be raised under the defence of insanity.<sup>780</sup> Voluntariness does not arise in the 'one punch' scenario as it is not usually disputed that the act of striking a person with a fist was not done involuntarily rather the argument is whether the consequence of a willed act could be foreseen.

In *R v Van Den Bemd*, it was ruled an event occurs by accident when it is such an unlikely consequence of a willed act by the accused, that an ordinary person would not reasonably have foreseen it.<sup>781</sup> This was, at once, a subjective and objective test rolled into one. The subjective element required the prosecution to prove beyond reasonable doubt, that the death was intended and foreseen by the accused. The objective element required the prosecution to prove beyond a reasonable doubt that death would have been reasonably foreseeable by an ordinary person in the position of the accused. It also involved a distinction between an event which an ordinary person would have foreseen as a real or substantial risk, as distinct from one which is a remote possibility.<sup>782</sup> It has also been argued that an appropriate direction is that the jury should ask whether the

---

<sup>777</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47.

<sup>778</sup> *R v Falconer* (1990) 171 CLR 30, 40.

<sup>779</sup> Michael Shanahan, Soraya Ryan, Anthony Rafter, John Costanzo & Andrew Hoare, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 19<sup>th</sup> ed, 2013) 114.

<sup>780</sup> See, for example, s 27 *Insanity Criminal Code 1899* (Qld).

<sup>781</sup> *R v Van Den Bemd* (1994) 179 CLR 137.

<sup>782</sup> *R v Hind* (1995) 80 A Crim R (Fitzgerald P).



consequence, said to have been caused by accident, was such an unlikely consequence of the action complained of, that a reasonable person would not have foreseen it.<sup>783</sup>

From this formula it would appear that in raising the excuse, an accused ‘one punch’ killer would have only the slightest prospects of success. This is because, as Callinan J pointed out in *Koehler v Cerebos*,<sup>784</sup> it is possible, with enough imagination and pessimism, for any ordinary person to foresee the occurrence of practically any event in the range of possible events in human affairs. This is notwithstanding the fact, that if the excuse is fairly raised by the evidence, the accused is entitled to have it put to the jury.

In a different context, Lord Pearce made the same point in *Hughes and Lord Advocate*, when he said ‘to demand too great precision in the test of foreseeability would be unfair since the facets of misadventure are innumerable’.<sup>785</sup> The fact that the occurrence of an event as a consequence of an act might seem in hindsight to have been a real possibility, does not mean that the defendant must always be understood as to have foreseen it, or that an ordinary person in the same circumstances would *reasonably* (my emphasis) have foreseen it.

There is also the point that, where a risk of injury has arisen from certain conduct, and death has resulted, the magnitude of the risk seems greater, with the benefit of hindsight. Certainly the reported cases in Queensland that demonstrate the excuse on its own, is rarely successful.<sup>786</sup> Although, it must be conceded, that in most instances involving violence, other defences such as provocation and self-defence are often raised in conjunction with accident, and it is difficult to tell which defence influences the jury in its deliberations.

---

<sup>783</sup> *R v Ellem [No 2]* [1995] 2 Qd R 549; ‘Accident s23(1)(b), [75.1]’, in *Queensland Supreme and District Court Benchbook*, (Queensland Supreme Court, 31 August 2012), [http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/86084/sd-bb-75-accident.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/86084/sd-bb-75-accident.pdf).

<sup>784</sup> *Koehler v Cerebos* (2005) 222 CLR 44.

<sup>785</sup> *Hughes and Lord Advocate* [1963] AC 837, 857.

<sup>786</sup> Queensland Government Department of Justice and Attorney-General, ‘Audit on Defences to Homicide: Accident and Provocation, (Discussion paper, October 2007) 33-39.

This may be because, as noted in *Stevens v The Queen*, different people may have different perceptions of facts.<sup>787</sup> That is, certain words or language or expressions of concepts, may provoke different responses in different people. For instance it may be that some might be more influenced by a reference to an ‘accident’ than to other defences. The fact that an accident, in legal terms, may require a judicial explanation does not deprive the word of its natural meaning of an unintended and unforeseen adverse event. English law is also averse to the use of degrees of probability to shape or confine fault elements. In a civil law context, Lord Reid said:

Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability.<sup>788</sup>

Drawing on this observation in *Hyam*, Lord Hailsham said that degrees of probability should play no part in the definition of fault elements in homicide.<sup>789</sup> If degrees of probability played such a role, in Lord Hailsham’s view, lawyers would be ‘driven to draw the line in a criminal case of high importance at precisely the point at which it was said to be neither practicable nor reasonable to do so’.<sup>790</sup> This point was also made by an American academic, who observed there was a long continuum of probability between the zero mark of utter impossibility, and the hundred mark of unattainable certainty.<sup>791</sup> Between them there are varying degrees of probability. Therefore, any model based simply on foresight of consequences, may be too crude. The degree of foreseeable risk required to ground a murder conviction may well depend on the justifiability of the risk-taking in question.

Interestingly, as Henry Barnes has noted, the Penal Code of the Russian Socialist Federal Soviet Republic, also refers to a foreseeability test when referring to criminal liability. For instance:

---

<sup>787</sup> *Stevens v The Queen* (2005) HCA 65.

<sup>788</sup> *Southern Portland Cement Ltd v Cooper* [1974] AC 623, 640.

<sup>789</sup> *Hyam* [1975] AC 55.

<sup>790</sup> *Ibid* 76-77.

<sup>791</sup> Frederick J Ludwig, ‘Foreseeable Death in Felony Murder’ (1956-57) 18 (1) *University of Pittsburgh Law Review* 51, 63.

Article 10. Persons who commit socially dangerous acts shall be liable to the application of measures of social defence of a judicial-correctional character only –

- (a) if they acted deliberately, that is, if they foresaw the socially dangerous consequences of their acts, or desired those consequences, or knowingly permitted them to happen, or
- (b) if they acted carelessly, that, if they did not foresee the consequences of their acts although they ought to have foreseen them, or if they light-mindedly hoped to avert such consequences.<sup>792</sup>

Article 10 is interesting, because it neatly expresses what is contained in the Griffith Code as well other penal codes across the world.

### 6.3 Foresight of the Probability of Death

A further criticism that can be made of an approach based on foresight of probability of death resulting, is that such an approach may be artificial. That is, defendants, especially those who decide to throw a punch, do not pause to fix a precise mathematical percentage to the risk in question. So, while a defendant may foresee that a risk of death will result from his or her actions, he or she may not have actually considered whether the risk in question amounted to the probability of death resulting. In many cases, this may be difficult or impossible for defendants or the jury to determine, as it may depend on a range of factors beyond their comprehension. An American case which illustrates this point is *People v Causey*,<sup>793</sup> where the defendant struck the victim on the side of the head with a jar of pennies, causing a clot in the brain. A conviction for murder was upheld, even though there was no evidence as what the chances were of such a clot developing. It is difficult to see how the defendant or the jury could have calculated such a risk.

Certainly, in Australia, it has been held that:

To enable a jury to be satisfied beyond a reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be “the only rational inference that the circumstances would enable them to draw”.<sup>794</sup>

---

<sup>792</sup> Henry Barnes, ‘Liability For Crime’ (1945-47) 9 (2) *Cambridge Law Journal* 210.

<sup>793</sup> *People v Causey* [2003] 793 NE 2d 169.

<sup>794</sup> Justices Gibbs, Stephen and Mason in *Barca v The Queen* (1975) 133 CLR 82 following *Plomp v The Queen* (1963) 110 CLR 234, 252.

This would seem to be fair to most jurists. Nevertheless, the perception that applying the concept of an accident in the criminal law can lead to unjust results, at least in the eyes of victims' families, has had enough resonance to lead to a number of Australian jurisdictions introducing new laws to circumvent the excuse.<sup>795</sup> As a result of what Gibbs J said in *Kapronovski v R*, in Queensland it was settled law that an event occurs by accident within the meaning of s 23(1)(b) (as it then was), if it was a consequence which was not in fact intended or foreseen by the defendant, and would not reasonably have been foreseen by an ordinary person.<sup>796</sup>

In *R v Van Den Bemd*, the test was said, by the Queensland Court of Appeal, to be one of foreseeability of the happening of the consequences as a matter of probability or 'likelihood'.<sup>797</sup> In the later case of *R v Taiters*, concern was expressed by the Court that the statement was replete with negatives and would be more easily understood by a jury if put in positive terms.<sup>798</sup> The Court said, when dealing with a defence of accident raised under s 23, the Crown was obliged to establish that the accused intended that the event in question should occur, or foresaw it as a 'possible' outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a 'possible' outcome.<sup>799</sup> Pincus JA thought that this put the matter in an acceptable, positive form.

At least one judge, however, has raised concern that an expression of the test in terms of what was a 'possible' outcome, as opposed to what was a 'likely' outcome, results in a direction much less favourable to the accused.<sup>800</sup> It also does not sit well with the statement by Gibbs J in *Kapronovski*. As Callinan J noted above, with sufficient imagination anything is possible. For instance, it is possible the ceiling might fall in on

---

<sup>795</sup> In 2008 the West Australian Government introduced a new law, 'Unlawful assault causing death' (s 281 of the *Criminal Code*) in response to community concerns that 'one punch killers' were using the accident excuse to escape conviction. Similar laws were introduced in three other States. S 281 Unlawful assault causing death *Criminal Code 1913* (WA); s 161A Unlawful assault causing death *Criminal Code 1983* (NT); s 25A Assault causing death *Amendment of Crimes Act 1900* (NSW); s 302A Unlawful striking causing death *Criminal Code 1899* (Qld).

<sup>796</sup> *Kapronovski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J).

<sup>797</sup> *R v Van Den Bemd* [1995] 1 Qd R 401, 405.

<sup>798</sup> *R v Taiters* [1997] 1 Qd R 333.

<sup>799</sup> *Ibid.*

<sup>800</sup> District Court (Qld) Judge Howell reported in Andrew West, 'Accidental grievous bodily harm to a susceptible victim' (2002) 22 (4) *The Queensland Lawyer* 109, 110.

us. It is possible but is it likely or probable? No. This point was acknowledged by Pincus, but he made the telling point that if the outcome of some action is regarded as certain, or even just more probable than not, it cannot legitimately be called an accident.<sup>801</sup> This is correct as a foresight of virtual certainty could be regarded as equivalent to intention. Nevertheless, he went on to say that if this direction is given, it would be desirable for a trial judge to add that in considering the possibility of an outcome the jury should exclude possibilities that are no more than remote and speculative.<sup>802</sup>

However, excluding possibilities that are ‘no more than remote and speculative’ can be seen as being too generous to the Crown. There is much to be said for the definition that Australian legislatures have adopted in Civil Liability where any risk by a plaintiff to justify negligence must be foreseeable *and* ‘not insignificant’, the latter term apparently intended to require a greater degree of probability or likelihood than the term ‘not far-fetched or fanciful’.<sup>803</sup> There is also much to be said for not attempting a precise definition of foreseeability because, as so often in all areas of the law, an absolute rigidity of principle in practice turns out to be unworkable or unfair.

In *Boughey v The Queen*, the High Court of Australia considered the correctness of a direction given in relation to culpable homicide and, more particularly, the expression ‘likely to cause death’ used in s 157 (1) of the *Criminal Code* (Tas). Justices Mason, Wilson and Deane, in their joint judgment, expressed the view that it was usually undesirable to attempt to explain ‘likely’ as entailing knowledge of some particular degree of probability or likelihood.<sup>804</sup> In any case, the meaning of the words ‘probable’ and ‘likely’ was liable to vary according to context. Gibbs CJ, also in the majority in *Boughey*, but delivering a separate judgment, expressed the view that the word ‘likely’, in the sections referred to, meant ‘probable’ and not ‘possible’. A trial judge ought not, he considered, refer to an ‘odds on chance’ or a ‘more than 50 per cent chance’,

---

<sup>801</sup> *R v Taiters* [1997] 1 Qd R 333, 338.

<sup>802</sup> *Ibid.*

<sup>803</sup> *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 1936* (SA) s 31; *Wrongs Act 1958* (Vic) s 48.

<sup>804</sup> *Boughey v The Queen* (1986) 161 CLR 10.

although it would be helpful to explain that a possibility (as distinct from probability) was not enough.<sup>805</sup>

## 6.4 A Probable Consequence

In *Darkan v The Queen*, the High Court considered the meaning of ‘probable’ in the expression ‘probable consequence’, used in s 8 of the *Criminal Code* (Qld).<sup>806</sup> The Court reasoned the expression ‘a probable consequence’ meant that the occurrence of the consequence did not have to be more probable than not, but it had to be better than possible. In other words, something that ‘could well happen’.<sup>807</sup> The trial judge had erred in telling the jury that a probable consequence was a real or substantial possibility or chance. The word ‘probable’, in any common usage, suggested a more exacting standard than ‘possible’. A problem arises if a judge, in his charge to the jury, puts a gloss on what is meant by a ‘remote or speculative possibility’.

This was the situation in a recent Queensland case, involving a ‘one punch’ killing, where the trial judge elaborated on the issue of foreseeing death as a ‘possible outcome’. He said:

Here we’re talking about a substantial likelihood, something more than a remote or speculative possibility. However, a substantial likelihood does not have to be more than 50/50. It can be less than 50/50, but it must be more than a remote or speculative possibility...<sup>808</sup>

The jury sought a redirection in relation to accident, and in the course of redirecting, the trial judge repeated his earlier comments in what was to be borne in mind in considering the ‘possible outcome’ of a blow.

In its decision to allow an appeal and order a re-trial, the Court of Appeal said the explanation of a substantial likelihood as something which, ‘may be less than 50/50 but a remote or speculative possibility is not enough’, carried the risk of giving the jury the

---

<sup>805</sup> Ibid para. 5.

<sup>806</sup> *Darkan v The Queen* (2006) 227 CLR 373.

<sup>807</sup> Ibid.

<sup>808</sup> *R v Hung* [2012] QSC 158.

impression that anything better than a remote or speculative possibility would suffice.<sup>809</sup> The Appeal Court said there was a significant difference between a ‘real and not remote chance’, and a possibility which is put no higher than that it is better than remote or speculative.<sup>810</sup> But the greater vice, the Court said, was that the learned judge’s directions equated a ‘likely’ result with a ‘possible outcome’.<sup>811</sup> The jury could, consistently with those directions, have concluded that if a possible outcome of the force used was death or grievous bodily harm, which would suffice to show that these results were likely.<sup>812</sup> Of importance, was that the evidence established that the fatal blow was one delivered with ‘mild force’.<sup>813</sup> The force of the blow, and what was ‘likely’ to follow from it, were pivotal questions for the jury where the evidence did not point to an inevitable and obvious answer. As Holmes JA said, the way the jury approached its finding, as to likelihood of death or grievous bodily harm, was of fundamental importance and demanded accurate direction.<sup>814</sup>

## **6.5 Pure Causation Test ‘not appropriate’**

In its submission to the QLRC’s report on accident and provocation, the Queensland Bar Association, with which the Queensland Law Society agreed, said a test based purely on causation was not appropriate in ‘civilised society’.<sup>815</sup> The very fact that liability is attracted on the basis of possibility, rather than probability, strikes the correct balance between the rights of the individual, and the legitimate expectations of the community that those to blame for injury and death will be punished.<sup>816</sup>

The objective/subjective test of s 23(1)(b) would seem to be an important safeguard against strict liability, but not all judges are satisfied with the directions concerning

---

<sup>809</sup> *R v Hung* [2012] QCA 341 para 26.

<sup>810</sup> *Ibid.*

<sup>811</sup> *Ibid* para 27.

<sup>812</sup> *Ibid.* At the time of these events s 23 of the Queensland *Criminal Code* had not been amended by s 4 of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

<sup>813</sup> *R v Hung* [2012] QCA 341 para 28.

<sup>814</sup> *Ibid.*

<sup>815</sup> Queensland Law Reform Commission, above n 1, 156.

<sup>816</sup> *Ibid.*

foreseeability.<sup>817</sup> Former Justice of the Supreme Court, the Hon. J B Thomas, in a critical submission to the QLRC, said that the direction about the foreseeability test was complex and difficult to explain to a jury: ‘I did not much like the directions, but did my best to explain them to juries. However, all too often I could see the juries’ eyes glazing over when these directions were given’.<sup>818</sup>

Justice Thomas was also dissatisfied with the foreseeability test itself, saying it called upon juries to apply a complex test. In the case of a ‘one punch’ killing, he said juries must consider the degree of force and risk to which the criminal act might expose the victim, whether the accused would have foreseen the consequence, and whether the ordinary person in the shoes of the accused would have foreseen it:<sup>819</sup>

This requires juries to speculate on matters that were probably not present in the accused’s mind anyway, and also on matters that probably would not be in the hypothetical ‘ordinary person’s’ mind if he or she were in the shoes of the accused. It will always involve fanciful and dangerous guesswork.<sup>820</sup>

On the other hand, another former Justice, the Hon. W.J. Carter QC in his submission to the QLRC, considered the law of accident, as it then was, a ‘just rule of good sense’.<sup>821</sup> He said that ‘One could not sensibly or objectively regard the rule as being so far removed from generally accepted principles of justice and fair play as to offend the public conscience and demand legislative correction’.<sup>822</sup> However, the importance of the meaning of the words ‘probable’, ‘likely’, ‘possible’ and ‘possibility’ cannot be overstated. A basic objective of the criminal law should be the expression of the elements of an offence, in terms which can be understood by citizens and juries. The meaning of ‘likely’ for example, may depend on its context, although the terms ‘likely’ and ‘probable’ are treated as synonyms by the Shorter Oxford and Macquarie Dictionaries.<sup>823</sup>

---

<sup>817</sup> Queensland Supreme Court, above n 733,  
[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/86084/sd-bb-75-accident.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/86084/sd-bb-75-accident.pdf)

<sup>818</sup> Queensland Law Reform Commission, above n 1, 141.

<sup>819</sup> Ibid.

<sup>820</sup> Ibid.

<sup>821</sup> Queensland Law Reform Commission, above n 1, 139.

<sup>822</sup> Ibid.

<sup>823</sup> *The Budget Macquarie Dictionary* (Macquarie Library 3<sup>rd</sup> ed, 1998) 234.



The High Court has had, over the years, some difference of opinion about the knowledge which an accused person must possess, in order to render him or her guilty of murder in situations where they lack an actual intent to kill or to do grievous bodily harm. The division of opinion is over whether there must be a knowledge of *probability* that their acts will cause death or grievous bodily harm, or whether knowledge of a *possibility* is enough. In *Pemble v The Queen*, Barwick CJ believed it sufficient that death or grievous bodily harm should be foreseen as possible.<sup>824</sup> Justices McTiernan and Menzies were of the opinion that it was necessary that the accused should have foreseen or known that death or grievous bodily harm would be a probable or likely consequence of the act.<sup>825</sup>

The matter was considered again in *La Fontaine v The Queen*.<sup>826</sup> In that case, Stephen J agreed with Barwick's opinion in *Pemble v The Queen*, that it was enough that the accused foresaw the possible consequences of his acts, but Barwick CJ now appeared to think that it was an open question whether it is sufficient if the accused appreciated a possibility rather than a probability of serious harm.<sup>827</sup> Gibbs and Jacobs JJ held that in a case of this kind, an accused would not be guilty of murder, unless he foresaw that death or grievous bodily harm was a probable consequence of his behaviour.<sup>828</sup> Mason J left the question open,<sup>829</sup> but noted that the suggestion made by Barwick CJ in *Pemble v The Queen*, was not a view shared by McTiernan and Menzies JJ, and it was at odds with speeches of the members of the House of Lords in *R v Hyam*.<sup>830</sup> As a side note, Lord Bridge of Harwich in *Moloney* thought 'foresight of consequences belongs not to the substantive law, but to the law of evidence'.<sup>831</sup>

---

<sup>824</sup> *Pemble v The Queen* (1971) 124 CLR 107, 118-121.

<sup>825</sup> *Ibid* 127, 135.

<sup>826</sup> *La Fontaine v The Queen* (1976) 136 CLR 62.

<sup>827</sup> *Pemble v The Queen* (1971) 124 CLR 107, 85-86.

<sup>828</sup> *La Fontaine v The Queen* (1976) 136 CLR 62, 75-77.

<sup>829</sup> *Ibid* 91.

<sup>830</sup> *R v Hyam* [1975] AC 55.

<sup>831</sup> *Moloney* [1985] 1 All ER 1025.

The matter was finally put to rest in *R v Crabbe*, when in a joint judgment the High Court said it should now be regarded as settled law in Australia, that if no statutory provision affects the position, a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder, if death in fact results.<sup>832</sup> It is not enough that he does the act knowing that it is possible, but not likely, that death or grievous bodily harm might result. Although the directions for murder and manslaughter are different, it is interesting to note the various opinions on what the words ‘probable’, ‘likely’ and ‘possible’ mean, in terms of criminal culpability. There appears to be no doubt that the test of foreseeability, in terms of what was a ‘possible’ outcome as opposed to what was a ‘likely’ or ‘probable’ outcome, results in a higher hurdle for an accused to overcome, in a case of death caused by ‘one punch’. Some academic commentators have also argued the concept of foresight, in relation to the meaning of recklessness, should include references to attitude as well as to awareness.<sup>833</sup> Although recklessness does not relate to the concept of foreseeability, there are some parallels that can be drawn, especially where the results of low level violence are often caused by an element of recklessness. That is, the defendant ‘couldn’t care less’ or ‘he or she was indifferent’ as to the result of their unlawful act.

Liability, therefore, may be justified on the basis that, in the face of an obvious risk (punching a person), the defendant did not trouble to think about the consequences of the assault. Of course, where foreseeability is denied, juries are able to infer *mens rea* from all the circumstances and evidence of what the defendant did at the time. In cases involving an assault, defendants when interviewed or cross-examined at trial, are often quite open about what they were thinking in the moments before the incident, and forensically it is often to their advantage to be so. In the minority of cases where defendants refuse to answer questions in an interview, or do not give evidence at trial, it may be possible to infer what their state of mind was from the surrounding circumstances. It is not the case however, that an accused person is presumed to intend

---

<sup>832</sup> *R v Crabbe* (1985) 156 CLR 464, [9].

<sup>833</sup> Diane J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ [1988], *The Criminal Law Review* 4; Barry Mitchell, ‘Recklessness Could Still Be A State of Mind’ (1988) 52 (3), *Journal of Criminal Law* 300.

the natural and probable consequences of his or her acts.<sup>834</sup> That approach was rejected by the High Court of Australia, which insisted the inquiry must be addressed to the ‘subjective’ state of mind of the accused, rather than the ‘objective’ state of intention, which the law attributed to the accused upon the basis of the objective facts.<sup>835 836</sup> According to Kirby J, the foundation for the rule is the fundamental principle that, statutory exceptions apart, intention must go with the act in order to constitute the crime.<sup>837</sup>

## 6.6 ‘Ordinary’ and ‘Reasonable’ Person

As previously stated, under s 23(1)(b) of the Queensland Criminal Code, an event can only be regarded as unforeseeable if the defendant neither intended it to happen, nor foresaw that it could happen, and if an ordinary person in the defendant’s position at the time would not have reasonably foreseen that it could happen. It should be noted that the function of the ‘ordinary person’ in criminal law should not be confused with the role of the artificial ‘reasonable man’ in the law of negligence.<sup>838</sup> That is because, to make what the reasonable man in the law of negligence would have done in the circumstances, the controlling standard of what might constitute an excuse to a charge of manslaughter, would be to, in effect, abolish the excuse altogether. After all, it is difficult to imagine a circumstance where a reasonable person would punch a person, other than in self-defence, let alone with enough force to kill them. This raises the question of who is the ‘ordinary’ and ‘reasonable’ person in criminal law ?

The Laws of England have historically placed great weight on the concept of the ‘reasonable’ man or woman. Generally, they will not say it is because they cannot specify exactly what ought to be done in all circumstances, and will phrase their demands instead in terms of what a reasonable man or woman in the circumstances

---

<sup>834</sup> *DPP v Smith* [1961] AC 290, 327.

<sup>835</sup> *Parker v The Queen* (1963) 111 CLR 610.

<sup>836</sup> *Ibid* 648. (Windeyer J).

<sup>837</sup> *Cutter v The Queen* [1997] 71 ALJR 638.

<sup>838</sup> *Moffa* (1977) 138 CLR 601, 613.

would do.<sup>839</sup> As a legal fiction, the consensus seems to be the ‘reasonable person’ is not an average person or a typical person.<sup>840</sup> Instead, the ‘reasonable person’ is a composite of the community's judgment as to how a hypothetical or ‘ordinary’ member of that community should behave, in situations that might pose a threat of harm to the public.<sup>841</sup> The ‘reasonable person’ construct can be found to be applied in many areas of the law. For instance, it performs a crucial role in determining negligence in both criminal and tort law. In defamation, the ordinary reasonable person is taken to be a person of average intelligence, who approaches the interpretation of a publication in a fair and objective manner.<sup>842</sup> The person is neither perverse, nor suspicious, nor ‘avid for scandal’.<sup>843</sup> There is a limit of reasonableness, so that the ordinary reasonable person does not interpret the publications in a strained, forced or utterly unreasonable way. These, of course, are objective tests.

Generally speaking, pure objective tests are used for minor offences where relatively light penalties are in contention. It is widely thought that subjective tests are more suitable for serious offences, where the accused faces severe penalties such as life imprisonment. However, objective tests are not entirely excluded from the more serious offences in common and code law as, for example, in manslaughter in cases where there is a high degree of negligence.<sup>844</sup> They are, as noted above, also included in tests for defences like ‘accident’ or mistake of fact. Colvin has identified that the primary problem for the design of objective tests of criminal responsibility, is that ordinary behaviour encompasses a range of conduct.<sup>845</sup> For example, ordinary people have ‘good’ and ‘bad’ days; sometimes they act to the best of their ability, other days they fall well short. This is often the case with the ‘one punch’ killer who, on a good day,

---

<sup>839</sup> John R. Lucas, ‘The Philosophy of the Reasonable Man’ (1963) 13 (51) *The Philosophical Quarterly* 97.

<sup>840</sup> *Bedder v DPP* [1954] 1 WLR 1119. (‘[where a reasonable man is deemed a wholly impersonal fiction to which no special characteristic of the accused should be attributed]’).

<sup>841</sup> *R v Camplin* [1978] 2 All ER 168 (a reasonable man (*sic*) ‘means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today’).

<sup>842</sup> Peter George, *Defamation Law in Australia* (LexisNexis Butterworths, 2006) 131.

<sup>843</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, 278-280.

<sup>844</sup> *Wilson v The Queen* (1992) 174 CLR 313.

<sup>845</sup> Eric Colvin, ‘Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility’ (2001) 27 (2) *Monash University Law Review* 197, 200.

would not behave in such an irresponsible way as to even inadvertently kill another person. More often than not, alcohol is a major contributor to the offence, and while intoxication is no excuse in any jurisdiction, it is not extraordinary behaviour, especially in Australia, for an ordinary person to become intoxicated during the course of their life and do things they later regret.<sup>846</sup>

Eric Colvin poses the question: 'Is the ordinary person to be assumed at the peak of ordinary emotional strength, or to be endowed with some lesser capacity for self-control'?<sup>847</sup> This is important, as often, (although not always) the 'one punch' killer is a young person, who may not have matured sufficiently to have become an ordinary person, in the sense of a reasonably well adjusted adult. Colvin concludes that objective standards, which a person must meet in order to avoid criminal liability, should be set at the lowest level of the relevant scale of ordinary behaviour and, secondly, the differences between people should be recognised by taking an ordinary person with any relevant special characteristics of the accused, as a standard of comparison.<sup>848</sup> This was recognised in *R v Camplin*, where the House of Lords decided that when a jury are considering whether the defendant reacted as a reasonable person, they should attribute to the reasonable person the defendant's age, sex and other relevant characteristics.<sup>849</sup> This, of course, dilutes the objective test. To do otherwise, Lord Morris said, would be 'unreal', and Lord Simon regarded a wholly objective test as an effrontery to common sense.<sup>850</sup>

*Camplin* was a case involving provocation, and it may be thought that extending this diluted reasonable person test to other defences, might make it too easy for defendants to escape liability. As Mitchell notes, this may be one reason why the civil courts have adopted a rigid adherence to a purely objective approach in negligence cases.<sup>851</sup> For

---

<sup>846</sup> Joshua Blake, 'My Name is Australia and I'm An Alcoholic', *Sydney Morning Herald* (online), 26 August 2010, <http://www.smh.com.au/opinion/society-and-culture/my-name-is-australia-and-im-an-alcoholic-20100826-13tqi.html>

<sup>847</sup> Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 (2) *Monash University Law Review*, 201.

<sup>848</sup> *Ibid* 227.

<sup>849</sup> *R v Camplin* [1978] 2 All ER 168.

<sup>850</sup> *Ibid* 174.

<sup>851</sup> Mitchell, above n 783, '304.

example, the High Court of Australia has held that a learner driver must comply with the same standard of care as any other person driving a motor vehicle and to take reasonable care to avoid injury to others.<sup>852</sup> This overturned their earlier decision in *Cook v Cook*, where they held that although the standard of care is objective, it should be adjusted to fit the special relationship under which it arises.<sup>853</sup> It could be argued this test is preferable, because the community's expectations should be restricted to the sort of person the defendant is, and not expanded to include the fictitious ordinary, reasonable person.

## 6.7 Objective Test Criticism

In relation to negligence, Hart has also proposed that negligence be assessed by reference to the ability of the accused, given his or her mental and physical capacities.<sup>854</sup> Justice Murphy was also a strong critic of the objective test. In his judgment in *Moffa*, he said it was not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test becomes.<sup>855</sup> Behaviour, he said, was influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation, and above all, individual differences. Therefore, it was impossible to construct a model of a reasonable or ordinary people for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances.<sup>856</sup>

Historically, this has not been the majority view of the courts. In *Vaughan v Menlove*, the defendant, Menlove, was found liable after his haystack caught on fire and destroyed several cottages belonging to his neighbour.<sup>857</sup> On appeal, Menlove challenged the charge to the jury, arguing that if he had acted to the best of his judgment, then he ought not to be responsible for the misfortune of not possessing the

---

<sup>852</sup> *Imbree v McNeilly; McNeilly v Imbree* [2008] 82 ALJR 1374. A similar duty has been recognised in the UK in *Nettlehip v Weston* [1971] 2 QB 691.

<sup>853</sup> *Cook v Cook* [1987] 61 ALJR 25.

<sup>854</sup> Hart, above n 303, 153-156.

<sup>855</sup> *Moffa* (1977) 138 CLR 601.

<sup>856</sup> *Ibid.*

<sup>857</sup> *Vaughan v Menlove* [1837] 3 Bing NC 468; 132 ER 490.

highest order of intelligence. The appeal was unsuccessful. Chief Justice Tindal explained that allowing Menlove's claim would result in a rule of liability that would be unacceptable, because it 'would be as variable as the length of the foot of each individual'.<sup>858</sup>

However, in his seminal work on the reasonable person, Moran Mayo notes that ever since *Vaughan*, much of the support for the reasonable person standard has ultimately rested upon the perceived fairness of a uniform rule.<sup>859</sup> Mayo questions the plausibility of defending a standard as vague as the reasonable person standard, on the ground that it specifies a single evident standard that applies uniformly to all.<sup>860</sup> For instance, a single standard can be troublesome when you take into account issues like race, ethnicity and the status of women. The conundrum is: How can the reasonable person test effectively provide a 'same size fits all' standard, when variables like those noted above are considered? Also, according to Wasik, directing one's mind as to what is reasonable 'conduct' is problematic.<sup>861</sup> Take for example, the awkward fall which unexpectedly results in death. Suppose that A is standing together with B, and they happen to be on a landing at the head of a flight of stairs. A and B have a dispute and to emphasise a point, A pushes B in the chest, quite hard. B, off-balance, tumbles backwards down the stairs and is killed. A, who had given no thought to such a thing happening, is horrified.<sup>862</sup> A, says Wasik, is guilty of negligent manslaughter if he ought reasonably to have been aware of a significant risk that his conduct could result in serious injury.<sup>863</sup> However, what matters is whether he ought to have thought of the risk involved in giving someone a push at the top of the stairs. Also, did his conduct fall significantly below what could have reasonably been expected of him in preventing that risk occurring?<sup>864</sup>

---

<sup>858</sup> Ibid 465.

<sup>859</sup> Moran Mayo, *Rethinking the Reasonable Person; An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003) 49.

<sup>860</sup> Ibid 50.

<sup>861</sup> Martin Wasik, 'Form and function in the law of involuntary manslaughter' [1994] *Criminal Law Review* 883, 891.

<sup>862</sup> In fact this scenario was played out in a real life Queensland case *R v Seminara* [2002] QCA 131 a case described by McPherson JA as 'more than usually tragic', para. 1.

<sup>863</sup> Ibid.

<sup>864</sup> Ibid.

One important consideration would be, how broadly or narrowly, the defendant's conduct would be construed by a jury. If his conduct is characterised as 'pushing B in the chest' then there is no reason why A should have reasonably been aware of a significant risk of injury to B, and would have a viable defence. If however, the conduct is characterised as 'pushing B in the chest while B was off-balance at the head of the stairs' then there is every reason why A should reasonably have been aware of such a risk.<sup>865</sup>

An optimistic approach is adopted by Lucas, who said that the fact we can engage in, and sometimes settle, disputes for which no formal decision-procedures exist, and that social activities which depend on the possibility of this can be carried on, is the final vindication of the reasonable man.<sup>866</sup> Also, if nearly all men and women are reasonable some of the time, some more than others, some quite a lot of the time, but none all of the time, then we should expect society to take the shape, which in fact it does. There are dangers in instructing jurors to put themselves, as the embodiment of the ordinary person, in the accused's shoes. In *Stingel*, a case involving provocation, the Australian High Court said while such an instruction may not involve any misdirection or error, it should be avoided.<sup>867</sup> Their Honours said such an instruction could involve the danger that it might be construed by an individual juror as an invitation to substitute him or herself, with his or her individual strengths and weaknesses, for the hypothetical ordinary person. The result could be to displace the objective standard by the particular juror's subjective view of his or her personal power of self-control, regardless of whether it be greater or less than that which should be attributed to a hypothetical ordinary person. If that occurred, it would be but a short step to the position where a defence of provocation would be sustained by a particular juror, only if that juror were prepared to concede, that he or she would have been guilty of the crime of manslaughter if placed in the situation of the accused. That, their Honours said, would involve a mistaken and unduly harsh operation of the objective test.<sup>868</sup>

---

<sup>865</sup> Ibid.

<sup>866</sup> Lucas, above n 789, 103.

<sup>867</sup> *Stingel* (1990) 171 CLR 312.

<sup>868</sup> Ibid, 327, 195.



## 6.8 Reasonable Test in Other Jurisdictions

George Fletcher takes issue with the pervasive use of the term ‘reasonable’, seeing it as an all-purpose test where faults of delay, care, force, and mistake are all allowed if they are reasonable.<sup>869</sup> He points to the major Continental jurisdictions to demonstrate that the reasonable construct is unknown in those systems. The French Civil Code uses the term *raisonnable* once;<sup>870</sup> the German and Russian Civil Codes do not use it at all,<sup>871</sup> and the Criminal Codes of Germany and Russia do not use these derivatives of reason.<sup>872</sup> For example, in German law, the guilty act is assessed for whether it was justified and not ‘abused’. In other words, whether the act was a proper response to a prior illegality, such as self-defence. The accused are assessed for whether their acts should be excused for an absence of ability to obey the law, a process similar to our subjective defences like ‘mistake of fact’.<sup>873</sup> According to Fletcher, the standard ‘what would the reasonable person do under the circumstances?’ sweeps, within one inquiry, questions that would otherwise be distinguished as bearing on wrongfulness or on blameworthiness’.<sup>874</sup>

American commentator Paul Robinson contends that empirical studies confirm that most people believe an individual should not be held to a higher standard, than he or she might legitimately be expected to meet.<sup>875</sup> The American Model Penal Code, in judging whether someone has acted as a ‘reasonable person’, directs that the adjudicator is not to base that determination on an abstract, monolithic notion of a reasonable person, but is directed to use the viewpoint of a reasonable person aware of the facts known to the particular actor in question and ‘in the actor’s situation’.<sup>876</sup> This seems to be a rational adaptation of the reasonable person test, especially as it relates to a person charged with

---

<sup>869</sup> George Fletcher, ‘The Right and the Reasonable’ [1985] *Harvard Law Review* 949.

<sup>870</sup> *Code Civil* [Civil Code] (France) art. 112 (defining influence on a party to a contract by appealing to the impressions of *une personne raisonnable*).

<sup>871</sup> See *Bürgerliches Gesetzbuch* [Civil Code] (Germany); [Civil Code] (Russian Socialist Federal Soviet Republic).

<sup>872</sup> See *Stratfgesetzbuch* [Criminal Code] (Germany) [*StGB*].

<sup>873</sup> *Ibid* 950.

<sup>874</sup> *Ibid* 962-63.

<sup>875</sup> Robinson and Darley, above n 498, 116.

<sup>876</sup> *American Model Penal Code* 1962 210.3 (1) (b).

a 'one punch' killing. For, in the last resort, human judgment is all that we have to go by, and we can only trust that it is possible for people to be reasonable, and sometimes even right.

## **6.9 Conclusion**

This chapter has discussed the concept of foreseeability and the difficulties in framing a suitable definition that is easy to understand for scenarios where an accused kills through the infliction of a single punch to a victim. Opinions differ as to the test of foreseeability, especially as defined by s 23 of the Queensland Criminal Code, with some jurists arguing that allowing juries to speculate on outcomes based on the current hypothesis involves dangerous guesswork while others maintain foreseeability is simply a rule that makes good sense. But, of more importance are the words 'probable', 'likely', 'possible' and 'possibility' which take on different meanings in terms of criminal culpability when deciding on a reasonable level of foreseeability for an accused involved in fatal, personal violence. There is little doubt that the test of foreseeability, in terms of what was a 'possible' outcome as opposed to what was a 'likely' or 'probable' outcomes, results in a higher hurdle for an accused to overcome, in a case of death caused by 'one punch'.



## **7 CAUSATION**

### **7.1 Introduction**

This chapter now moves on from the tests of foreseeability to an overview of causation especially as it relates to a ‘one punch’ killing. Causation in criminal law is the link between the conduct of the accused and its consequence. The term is generally applied to crimes of violence, especially murder and manslaughter. That is, did the act or omission of the accused cause the injury or death of the victim? Causation is also a question of fact to be decided by the jury. Like the word ‘accident’, causation has a different legal meaning than the way it is used in ordinary speech. As Yeo points out, numerous commentators have distinguished between causation in fact and causation in law, when analysing the issue in criminal law.<sup>877</sup> Whereas causation in fact involves a purely scientific inquiry, causation in law constitutes a moral inquiry into the blameworthiness or otherwise of a defendant. The Model Criminal Code Committee stated ‘causation is a physical, not fault, element; it is not concerned with whether responsibility ought to be attributed to the defendant’.<sup>878</sup> Although courts in Australia have tended to direct juries that the question of cause for them to decide is not a philosophical or scientific question but a question to be determined by them applying their common sense to the facts as they find them.<sup>879</sup>

### **7.2 Causation tests**

In criminal law, the courts have developed a number of tests to assess whether an accused’s conduct caused the required result or consequence. Broadly speaking they are defined as:

- the reasonable foreseeability test;
- the substantial cause test; and
- the natural consequence test.

---

<sup>877</sup> Stanley Yeo, ‘Blameable Causation’ (2000) 24 (3) *Criminal Law Journal* 144, 145.

<sup>878</sup> Model Criminal Code Officers Committee, above n 41, 27.

<sup>879</sup> *Campbell v The Queen* [1981] WAR 286

According to Bronitt and McSherry, each test has found favour with different courts at different times.<sup>880</sup> It is also not unusual for courts to refer to these tests interchangeably.<sup>881</sup> Therefore, it comes as no surprise that causation is widely regarded as presenting very difficult issues for criminal law. Colvin, for example quotes an official report as stating: ‘There is no more intractable problem in the law than causation’.<sup>882 883</sup> Similarly, McHugh J stated in *Royall v The Queen*:

Judicial and academic efforts to achieve a coherent theory of common law causation have not met with significant success. Perhaps the nature of the subject matter when combined with the lawyer’s need to couple issues of factual causation with culpability make achievement of a coherent theory virtually impossible.<sup>884</sup>

The threshold test for blameable causation has frequently been expressed as being where the defendant’s conduct was ‘beyond the *de minimis* range’, had ‘contributed significantly’, or was a ‘substantial cause’ of the end result.<sup>885</sup> For the sake of clarity, to describe something as having a ‘substantial’ impact attaches a greater degree of importance or influence to it than does the word ‘significant’. For instance, the *Macquarie Dictionary* defines ‘substantial’ as ‘pertaining to the essence of a thing’ compared to its definition of ‘significant’ as, ‘important; of consequence’.<sup>886</sup> The reasonable foreseeability test has already been canvassed in this thesis, but for the sake of completeness some reference should be made to the other two tests.

---

<sup>880</sup> Bronitt and McSherry, above n 57, 164.

<sup>881</sup> For instance in *Royall v The Queen* [1991] 65 ALJR 451 (Brennan J) a majority (Mason CJ, Deane and Dawson JJ) favoured the natural consequences test. Justices Toohey and Gaudron, the substantial cause test and Brennan and McHugh JJ, in separate judgments, the reasonable foreseeability test.

<sup>882</sup> Eric Colvin, ‘Causation in Criminal Law’ (1989) 1(2) *Bond Law Review* 253.

<sup>883</sup> Criminal Law and Penal Methods Reform Committee of South Australia, ‘The Substantive Criminal Law’ (Fourth report, 1977) 50; also see Yeo, above n 827, 144.

<sup>884</sup> *Royall v The Queen* [1991] 65 ALJR 451, 448 (Brennan J).

<sup>885</sup> *R v Cato*; *R v Morris*; *R v Dudley* [1976] 1 All ER 260

<sup>886</sup> *Budget Macquarie Dictionary* (Macquarie Library 3<sup>rd</sup> ed, 1998) 403.

### 7.3 The Substantial Cause Test

The Substantial Cause test is the most common, and some say the most useful, test applied to establish causation.<sup>887</sup> One definition of a causation test based on substantial cause has been put forward by a Canadian academic:

- (a) 'Everyone causes a result when his or her conduct substantially contributes to its occurrence, or when it substantially increases the chances that it will occur to an extent that justifies holding him or her responsible for the result if it does occur, unless:
  - (i) the result, or
  - (ii) the way in which the result occurred differs substantially from that which was foreseen or foreseeable, or unless:
  - (iii) it occurred at a substantially later time than was foreseen or foreseeable.
- (b) A victim's unforeseen or unforeseeable physical or psychological condition does not interrupt the causal link between a person's conduct and the resulting harm to the victim.<sup>888</sup>

The substantial cause test was developed most notably in the United Kingdom in *R v Smith*, and was also applied in Australia in *R v Hallet* some 10 years later<sup>889 890</sup>. In *Hallet*, the accused had attacked the victim on a beach beneath the high tide mark, rendering him unconscious. The evidence suggested the victim died from drowning in shallow water. The accused, however, claimed that he had not drowned the victim, but had simply left him in what he thought was a position of safety, with the victim's ankles in only a few centimetres of water. The accused was convicted, and appealed to the Supreme Court of South Australia which put the test as follows:

The question to be asked is whether an act or series of acts consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the

---

<sup>887</sup> Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 197.

<sup>888</sup> Donald Galloway, 'Causation in Criminal Law: Interventions, Thin Skulls and Lost Chances' 14 *Queen's Law Journal* (1989) 71, 82.

<sup>889</sup> *R v Smith* [1959] 2 QB 35.

<sup>890</sup> *R v Hallett* [1969] SASR 141.

happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.<sup>891</sup>

The Court held that the accused's (Hallett) original blow which rendered the victim unconscious started the events which led to the victim drowning. It could not be said that the tide coming in broke the chain of causation.

Similarly, in *McAuliffe v R*, it was found that because of the bashing the victim received from the accused, he ended up on a ledge from which he subsequently fell and died.<sup>892</sup> Therefore, the bashing was considered to be a substantial or significant cause of death. These cases confirm that to establish causation, the accused's conduct need not be the sole cause of the victim's death; all that must be proved is that the accused's conduct was a substantial cause.

As was said in *Royall v The Queen*, the question is not a philosophical or scientific one, but a question to be determined by the jury, applying their common sense to the facts as they find them while at the same time appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.<sup>893</sup> Some scholars argue the Australian High Court's 'substantial cause' test is more onerous than the 'but for' or *sine qua non* test applied in other jurisdictions.<sup>894</sup> The 'but for' standard dictates that a person causes an outcome if he or she is 'a contributing cause outside the *de minimus* range',<sup>895</sup> whereas the High Court's decision in *Royall* suggests that an accused must 'substantially' cause the outcome to count as a legal cause.<sup>896</sup> However, the test was somewhat ameliorated in the later case of *Arulthilakan v The Queen*, where the majority noted that the 'but for' test and the 'substantial cause' test could be read together.<sup>897</sup>

Therefore, it would seem logical that in Queensland, if a victim dies as the result of 'one punch', then it could correctly be said that this type of conduct would have substantially

---

<sup>891</sup> Ibid 149.

<sup>892</sup> *McAuliffe v The Queen* (1995) 183 CLR 108.

<sup>893</sup> *Royall v The Queen* [1991] 65 ALJR 451, 387, 425, 441 (Brennan J).

<sup>894</sup> Yeo, above n 827, 147-149.

<sup>895</sup> See *R v Smithers* [1978] 1 SCR 506, 34 CCC (2d) 427, 519; *R v Cato* [1976] 1 All ER 260, 266.

<sup>896</sup> *Royall v The Queen* [1991] 65 ALJR 451, 440 (Brennan J).

<sup>897</sup> *Arulthilakan v The Queen* [2003] 78 ALJR 257.

contributed to the death, and would therefore be liable for murder or manslaughter as the case may be. Basing criminal responsibility solely on the basis of a ‘pure causation’ test, as put forward by some submissions to the QLRC, does not appear to have won much favour.<sup>898</sup> Under this approach, the question for the jury would simply be whether the defendant’s punch was the cause of the resulting injury or death. The main argument in favour of this option is that a person should be criminally responsible for the ultimate harm caused by his or her intentional acts, regardless of whether that harm is foreseeable, or whether the act is the sole cause of that harm.<sup>899</sup> The main argument against this option is that it imposes criminal responsibility beyond the intention that accompanied the act, which need not even be an unlawful act.<sup>900</sup>

## 7.4 The Natural Consequence Test

The natural consequence test (or reasonable act test, as some describe it) arises when the victim has contributed to his or her own death,<sup>901</sup> for example, by seeking to escape or attempting to avoid being attacked by the accused. In Australia, the leading case that demonstrates this test is *Royall v The Queen*.<sup>902</sup> In that case the victim died after falling from the window of a sixth floor flat. The evidence pointed to the victim having been previously seriously assaulted by the accused, and in fear of her life, had either been forced to jump out of the window to escape the attack, or had fallen from the window while retreating.

Chief Justice Mason said the accused remained causally responsible for the death suffered by the victim, if the victim’s action could be said to have been reasonable, or the natural consequence of the accused’s conduct.<sup>903</sup> He seems to equate a ‘natural

---

<sup>898</sup> Queensland Law Reform Commission, see above n 1, 187 ‘the Commission is of the view that the excuse of accident section 23 (1) (b) as presently based on the concept of foreseeability, is an appropriate test for determining criminal responsibility.’

<sup>899</sup> Ibid 131.

<sup>900</sup> Ibid.

<sup>901</sup> Scholenhardt, above n 835, 196.

<sup>902</sup> *Royall v The Queen* [1991] 65 ALJR 451 (Brennan J).

<sup>903</sup> Ibid 389.



consequence' with 'something that is very likely to happen'.<sup>904</sup> Elsewhere in his judgment he seems to resile from this probabilistic interpretation, when he introduces the concept of reasonableness, and also when he rejects the rival test for causation based on foreseeability. While Deane and Dawson JJ agreed with the natural consequence test, other members of the court differed. In his decision, McHugh J questioned why it should be required that an accused, who has induced a victim to harm him or herself, should escape criminal liability because the victim has acted unreasonably.

As Scholenhardt writes, it seems unfair and inappropriate to require that a victim, in situations of threat or duress, to act rationally and reasonably.<sup>905</sup> This would seem to make sense as it is unlikely that people, subject to violence or the threat of violence, will always think rationally or act reasonably. However, in any event, it is difficult to imagine a scenario where the natural consequence test could be fitted into a thesis involving accident.

## 7.5 Intervening Acts

Causation also involves an investigation into whether any intervening acts that may break the chain of causation (*novus actus interveniens*) occur between the accused's conduct and the result, thereby relieving the accused from criminal liability for the event.<sup>906 907</sup> This test is especially relevant in cases of minor violence, where a victim unexpectedly falls over and hits their head on a hard surface which causes their death. Therefore, the question that arises is - Is the collision with the ground an intervening act? The victim would not have fallen had he or she not been punched, but, conversely, the punch, on its own, did not inflict the fatal injury. It may be argued that a fall following a punch to the head is foreseeable as a possible outcome of a punch, and it is likely a jury would not acquit on the basis of the accident excuse being raised.<sup>908</sup> But this is not always the case.

---

<sup>904</sup> See his reference to *Beech* [1912] 7 Cr App R 197.

<sup>905</sup> Scholenhardt, above n 835, 197.

<sup>906</sup> A new act intervening.

<sup>907</sup> *R v Smith* [1959] 2 QB 35.

<sup>908</sup> See, for example, *R v Martyr* [1962] Qd R 398.

For instance, in *R v Taiters*, two men became involved in a fight on the street. The victim was punched, and then fell heavily, hitting his head on the cement footpath.<sup>909</sup> He was taken to hospital, but was allowed to leave shortly afterwards. His symptoms continued and some days later he returned to hospital where it was found he had a fractured skull. Despite treatment, he died. Taiters was then tried for manslaughter. After the prosecution led its evidence, the trial judge indicated he would direct the jury that Taiters should be acquitted, on the basis that it was not open to them to be satisfied beyond a reasonable doubt that the accused was guilty of manslaughter. At that point, the prosecution sought a return of the indictment, entered a *nolle prosequi*, and sought the Court of Appeal's consideration of a point of law.<sup>910 911</sup>

As noted in a previous chapter, the Court of Appeal ruled that to be guilty of manslaughter, the jury did not have to be satisfied beyond reasonable doubt that the victim's death was a probable or likely consequence of Taiters' blow; just that his death was reasonably foreseeable as a possible outcome. The interesting, and some might say surprising aspect of this case, was that the Crown did not proceed with the manslaughter charge. Instead, Taiters pleaded guilty to assault occasioning bodily harm. Presumably, the Crown must have accepted that, in the circumstances, the death of the deceased was such an unlikely consequence of the punch that an ordinary person could not have reasonably foreseen it. By charging the lesser offence the Crown did have the satisfaction of making sure the offender did not escape sanction. Although it is dangerous to speculate, it would appear the public attitude towards 'one punch' killers has changed in the eighteen years or so since *Taiters* was decided. Recent cases based on facts similar to *Taiters* have routinely resulted in guilty verdicts of manslaughter.<sup>912</sup>

---

<sup>909</sup> *Taiters* [1997] 1 Qd R 333.

<sup>910</sup> *Nolle prosequi* meaning unwillingness to prosecute, Leslie Rutherford and Sheila Bone (eds) *Osborn's Concise Law Dictionary* (Sweet & Maxwell, 8<sup>th</sup> ed, 1994).

<sup>911</sup> *Criminal Code 1899* (Qld) Appeal by Attorney-General S 669A (2).

<sup>912</sup> Ava Benny-Morrison, 'Manslaughter Verdict for Fatal Punch', *The Queensland Times* (Brisbane), 12 September 2012.

## 7.6 Reasonable Foreseeability

Reasonable foreseeability depends, of course, upon an assessment by the jury of all the circumstances, including the force with which the punch was delivered, the relative sizes of the defendant and the deceased, the site of the blow, and where the incident occurred. Similarly, if a moderate blow caused the deceased to stumble into the path of an oncoming car, then criminal responsibility would depend on whether the deceased's being hit by a car was a reasonably foreseeable consequence of the punch, taking into account all the circumstances, including the location at which the punch was thrown, and the traffic conditions at the time.

An example is *R v Knutsen*, where the defendant knocked his victim unconscious, and left her lying in the middle of the road.<sup>913</sup> She was subsequently run over by a passing car and suffered serious injuries, including brain damage. The trial judge told the jury that they could convict Knutsen of unlawfully doing grievous bodily harm, if they were satisfied he foresaw as a likely outcome of his leaving his victim on the road, that she would be struck by a vehicle, or if an ordinary person would have reasonably foreseen that result. Knutsen was convicted but appealed his conviction. He argued that under s 23, a person was criminally responsible for a physical act which he 'willed', but was not so responsible for even the foreseeable consequences of that act unless he willed those consequences. His argument regarding the interpretation of s 23 was not successful, but his appeal against conviction was allowed, by a majority, on the basis that the victim's injuries were not reasonably foreseeable. Justice Stanley concluded that the victim's injuries were not reasonably foreseeable, because unconsciousness could be of a short duration, and it was impossible to say that an ordinary person in Knutsen's position at the time would reasonably have foreseen that the victim would still be unconscious when a motor vehicle came along.<sup>914</sup> Furthermore, Mack J referred to the width of the road, traffic conditions and visibility. He concluded it was unlikely any vehicle would have run over the victim as she was clearly visible. It should be noted this was a 1962 case; looking through twenty-first century eyes, this observation would seem surprising.

---

<sup>913</sup> *R v Knutsen* [1963] Qd R 157.

<sup>914</sup> *Ibid* 157, 170.

The dissenting judge, Philp J, said that the question whether an ordinary person would reasonably foresee the consequence did, in fact, occur. He made the point that if the victim had been injured by a helicopter striking her, that injury would have been an event which occurred by accident, an unforeseeable consequence, and Knutsen would not have been responsible.<sup>915</sup> It would be more than likely a jury today would agree with Philp J's conclusion and find Knutsen criminally responsible of grievous bodily harm, on the basis of reasonable foreseeability.

This was, in fact, precisely the decision reached in a similar New Zealand case some 13 years later, which approved *R v Knutsen*.<sup>916</sup> In that case, an argument arose between the accused and the deceased on a pavement near a taxi rank in Queen Street, Auckland's busiest thoroughfare. The accused pushed the deceased who fell from the pavement, and shortly thereafter was run over by a passing car and died. Before the accused was given in charge of the jury, the defence moved that the court quash the count of manslaughter, and that the accused be discharged. It was argued that there was no *nexus* between any act of the accused and the death of the deceased, or alternatively that there was a *novus actus interveniens*. Justice Barker, dismissing the motion said:

‘The unlawful act of killing a person, depends upon consideration of the physical movement of the accused viewed in the context of its surroundings, is an act that a reasonable man would know was fraught with risk of serious harm to some person, whether or not the accused was aware of this’.<sup>917</sup>

On that basis there were ample grounds for holding that a jury could find that knocking a man into a busy street at 10:30pm was an inherently dangerous act, meaning an act that a reasonable person would know was fraught with a risk of serious harm to some person, whether or not the accused was aware of this.

Of course, there must be sufficiency of evidence that there was in fact an intervening event. In *R v Puckeridge*, the High Court said in a joint judgment that the issue is whether, on the prosecution evidence, the jury was entitled to be satisfied beyond

---

<sup>915</sup> Ibid 166.

<sup>916</sup> *R v Fleeting (No 1)* [1977] NZLR 1, 343.

<sup>917</sup> Ibid.

reasonable doubt that it was the act of the respondent that caused the death of the victim.<sup>918</sup>

## 7.7 Conclusion

This chapter has, among other things, studied the liability of a ‘one punch’ killer in regard to the foreseeability, causation and consequences of an accused’s actions, as they concern criminal law. Having reviewed the various arguments concerning objective and subjective tests, it is difficult to resile from the observation that a hybrid standard is the best test for liability in the case of ‘one punch’ killers. This is because it takes into account the intention and characteristics of the assailant, and, at the same time, provides a community standard through reference to the ordinary, reasonable person’s definition of a ‘probable’ or ‘likely’ outcome, as compared with a ‘possible’ outcome.

There is little doubt the ‘possible’ outcome test, as opposed to a ‘probable’ or ‘likely’ test, results in a much less favourable direction to the accused, notwithstanding the rider that the jury should exclude possibilities that are no more than ‘remote and speculative’.<sup>919</sup> Nevertheless, as the Queensland Bar Association has submitted, it does appear to strike the right balance between the rights of the individual and the expectation of the community, that those to blame for injury and death will be punished.<sup>920</sup> As for the ordinary and reasonable person, there is much to commend the American Penal Code’s judgment of a reasonable person, as a person aware of the facts known to the particular actor in question and ‘in the actor’s situation’.<sup>921</sup> This criterion would be helpful to a jury, particularly when deliberating on the actions of a young person charged with murder or manslaughter resulting from an unlawful assault that resulted in death, as the decisions of youth in volatile situations often differ from a mature adult’s when considering the consequences of actions.<sup>922</sup> The reasonable foreseeability test,

---

<sup>918</sup> *R v Puckeridge* [1999] 74 ALJR 373.

<sup>919</sup> *R v Taiters* [1997] 1 Qd R 333.

<sup>920</sup> Queensland Law Reform Commission, above n 1, 156.

<sup>921</sup> US Model Penal Code 210.3 (1) (b).

<sup>922</sup> R M Trimpop, J H Kerr & B D Kircaldy, ‘Comparing Personality Constraints of Risk-Taking Behaviour, *Personality & Individual Differences* (1999) 26 (2) 237-54.

therefore, would seem to be the best for cases where the excuse of unintentional and unforeseen consequences is raised.

In relation to the 'one punch' killer, the only question for the jury would be whether the defendant's punch was the cause of the injury or death. Basing criminal responsibility on a 'pure causation' test would seem to be unjust, in that it proposes that a person should be responsible for the result of his or her intentional acts, regardless of whether they are foreseeable or not. This approach is also inconsistent with civil law, for example, torts, where a person cannot be held responsible for something that is not foreseeable, therefore why should they be held criminally responsible?<sup>923</sup> It also fails to take into account intervening acts that may break the chain of causation. This test is particularly relevant in cases of minor violence, where a victim unexpectedly falls over and hits their head on a hard surface which causes their death. The intervening act should be put to a jury to be decided on a reasonably foreseeable test, rather than a simple pure causation test.

However, while foreseeability, causation and consequences are extremely relevant in the context of murder and manslaughter, these are not the only charges that can be preferred against 'one punch killers'. Less grave, but still serious charges, can be laid and, as has already happened in several Australian jurisdictions, new charges have been invented to cover what some see as an apparent gap in the law relating to properly dealing with 'one punch' killers.

In the next chapter I will canvass the alternative offences that can be charged, and whether the excuse of unintentional and unforeseen consequences is still relevant for the different elements that arise from these causes of action.

---

<sup>923</sup> For instance s 9 *Civil Liability Act 2003* (Qld).



## 8 *ALTERNATIVE OFFENCES*

### 8.1 Introduction

In this chapter I will canvass the alternative offences that can be charged in relation to ‘one punch’ killers, and whether the excuse of unintentional and unforeseen consequences is still relevant for the different elements that arise from these alternative causes of action.

In any criminal prosecution for a serious offence, there is an important public interest in the outcome.<sup>924</sup> As Lord Bingham of Cornhill put it in *R v Coutts*,<sup>925</sup> the public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed, and should not be convicted of offences which they are not proved to have committed.

The interests of justice are not served if a defendant who has committed a lesser offence, is either convicted of a greater offence, exposing him or her to a greater punishment than their crime deserves, or acquitted altogether, enabling them to escape the measure of punishment which the crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, and also not acquitted when they have committed a lesser offence of the type charged.<sup>926</sup> In essence, the law should recognise the distinctions between different forms of criminal behaviour. That is, crimes should be separated from one another, and labelled so as to reflect the nature and gravity of the offending.<sup>927</sup> For example, if in a trial for murder there is credible evidence which would, if accepted, support a verdict not of murder but manslaughter, the trial judge ought to leave manslaughter to the jury for their consideration, unless it would be for any reason unfair to do so.

---

<sup>924</sup> *R v Fairbanks* [1986] 1 WLR 1202, 1206.

<sup>925</sup> *R v Coutts* [2006] 1 WLR 2154.

<sup>926</sup> *Ibid.*

<sup>927</sup> Barry Mitchell, ‘Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling’ (2001) 64 (3) *Modern Law Review* 393.



An alternative offence, by definition, is a lesser offence than that charged. The word comes from the Latin *alter* which means the taking of one of only two possible courses. As David Ross QC succinctly put it, those courses are mutually exclusive.<sup>928</sup> When more than two possible courses are open they are not alternatives. The taking of one of those is a choice.

The question of alternative verdicts has practical importance to both prosecutors and defence counsel. This was demonstrated in *Coutts*,<sup>929</sup> where there was a contest between the Crown's allegation of a deliberate killing on one hand, and an accident on the other. The brief facts of the case were that the defendant had strangled the victim in the course of some consensual, fetishist, sexual activity. The defendant said the victim's death was an accident, whereas the Crown argued the act was a deliberate killing. The only issue left to the jury was whether the defendant was guilty of murder. The Crown conceded there was room, in law, for the alternative verdict of manslaughter, but having set out their case as a contest between deliberate killing and an accident, if they failed to prove the deliberate killing, then the defendant was entitled to an acquittal. The judge asked counsel for the defence whether counsel was inviting him to put manslaughter to the jury. After some deliberation counsel declined the request and the jury was not asked to consider manslaughter.

In a statement which the defendant made for the purposes of his appeal, he said he was advised by his counsel that he would receive a sentence as long as 15 years on a conviction for manslaughter. On the other hand, if he 'rolled the dice' and put the Crown to proof, he could escape conviction altogether. It was apparent, therefore, that rather than accept the strong probability of a conviction for manslaughter with a lengthy sentence, he decided he would bank on an acquittal on the count of murder, although that course also involved running the risk of a conviction for murder. The appeal was upheld on the grounds that the judge should have put manslaughter to the jury as an alternative. In his speech, Lord Bingham said that if in a trial for murder there is credible evidence which would, if accepted, support a verdict not of murder but manslaughter, the trial judge ought to leave manslaughter to the jury for their

---

<sup>928</sup> David Ross, *Ross on Crime* (LBC, 5<sup>th</sup> ed, 2011) 1.4200.

<sup>929</sup> *Coutts* [2006] UKHL 39 (19 July 2006).

consideration, unless it would for any reason be unfair to do so.<sup>930</sup> That is, the judge should follow that course, even though the defence has not advanced such a case, and even though the prosecution has not raised, or has rejected, that possibility.<sup>931</sup> According to Lord Bingham, there was a risk that a jury, faced with a stark choice between convicting of murder and acquitting a defendant whose conduct might not only be thought repulsive, but dangerous, then they may convict of murder because, consciously or subconsciously, they are unwilling to acquit.<sup>932</sup>

The pressure to compromise jurors in this manner was also addressed in the later case of *Foster*, where it was said a jury may unconsciously, but wrongly, allow its decision to be influenced by considerations extraneous to the evidence, such as where the defendant's conduct is, on any view, 'utterly deplorable', and convict of the more serious charges rather than acquit altogether.<sup>933</sup> In such circumstances, to omit directions about a possible lesser alternative verdict, may therefore work to the defendant's disadvantage.<sup>934</sup> This view is consistent with *Stevens v The Queen*, where it was said there must be evidence which fairly raises the alternative offence.<sup>935</sup> It will not fairly arise if it would be unsafe to convict the accused on the alternative basis. Therefore, it is now appropriate to detail what some of the alternative offences to murder or manslaughter are.

## 8.2 Unlawful Assault Causing Death

A new offence of unlawful assault causing death has been proposed, to ensure that those accused who avail themselves of the excuse of a lack of foreseeability following a fatal assault, do not escape conviction if they defeat charges of murder or manslaughter. In some respects this position echoes the view submitted by the minority of the High Court in *Wilson v The Queen*, that if an unlawful and deliberate act committed without lawful justification or excuse, does not constitute manslaughter, there is a gap in the law that

---

<sup>930</sup> Ibid.

<sup>931</sup> Ibid.

<sup>932</sup> Ibid.

<sup>933</sup> *R v Foster & Ors* [2007] EWCA Crim 2869.

<sup>934</sup> Ibid para.60.

<sup>935</sup> *Stevens v The Queen* [2005] 80 ALJR 91.

can be filled only by some other doctrine.<sup>936</sup> The obvious attraction of the proposed new offence is that it would also provide some solace to the family of the deceased, as it acknowledges the defendant's contribution to the deceased's death. If the offence was confined to unlawful assault occasioning bodily harm with death as an aggravating circumstance, or simply causing grievous bodily harm, it may be perceived as too broad an offence, which does not indicate the sort of harm that has been done, and may not be fair to the victim. This could make the victim, or those close to the victim, feel that the harm done was not adequately recorded, or taken seriously, and this could undermine confidence in the justice system.<sup>937</sup>

In 2007, the Shadow Attorney-General and Shadow Minister for Justice, the Honourable Mark McArdle MP (as he then was) introduced into Queensland Parliament a private member's Bill, the Criminal Code (Assault Causing Death) Amendment Bill. The Bill proposed that new provision for the offence of 'unlawful assault causing death' be inserted into the Criminal Code in these words:

**341 Unlawful assault causing death**

- (1) Any person who unlawfully assaults another causing the death of the other person is guilty of a crime, and is liable to imprisonment for 7 years.
- (2) The person is not excused from criminal responsibility for the death of the other person because the offender does not intend or foresee or cannot reasonably foresee the death.

The explanatory notes to the Bill explained that the purpose of the proposed new offence was to provide an alternative to murder or manslaughter, where an unlawful assault causes death, but the elements of the more serious charges can be established.<sup>938</sup> When speaking to the Bill in Parliament, Mr McArdle referred to the case of *R v Little*, and explained that the Bill sought to respond to 'community concern' in relation to 'one punch' cases.<sup>939</sup>

---

<sup>936</sup> *Wilson v The Queen* (1992) 174 CLR 313, 341 (Brennan, Deane and Dawson JJ).

<sup>937</sup> Thomas Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia', winter [2008] *Oxford University Commonwealth Law Journal* 187, 197.

<sup>938</sup> Explanatory Notes, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) 3.

<sup>939</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007', 9 August 2007, (Mark McArdle), 2465.

In the Second Reading debate on the Bill, the Attorney-General said that the new offence added nothing to the existing range of offences, to which significant penalties apply, and which are able to be charged as alternatives to murder or manslaughter.<sup>940</sup> (Presumably the Attorney-General was referring to offences such as grievous bodily harm and assault occasioning bodily harm). Secondly, he said, it may have an unintended effect on the availability of other defences.<sup>941</sup> This was pointed out by a submission from the Office of the Director of Public Prosecutions to the QLRC, where it was observed that the reason assault is not an element of manslaughter or grievous bodily harm, is that ‘assault contains an element of absence of consent’.<sup>942 943</sup> The Bill was subsequently defeated on party lines.

The principle, reflected in the Queensland Criminal Code, is that while one can consent to modest violence (up to bodily harm),<sup>944</sup> it is contrary to the public interest to allow a defence of consent to any more serious violence. This position already sets the law in Queensland apart from the law which prevails elsewhere in Australia. For example, Victoria and New South Wales have adopted the rule laid down by the English Court of Appeal in *Re Attorney-General's Reference (no 6 of 1980)*, and it has since been adopted in at least one of the Australian Code states (Tasmania).<sup>945 946</sup> Under those circumstances, it appears Queensland's interpretation of the law seems to be at odds

---

<sup>940</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, ‘Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007’, 14 November 2007’, (Kerry Shine), 4311.

<sup>941</sup> Ibid.

<sup>942</sup> Queensland Law Reform Commission, above n 1, 203.

<sup>943</sup> *Criminal Code 1899* (Qld) s 245. Definition of ‘assault’: 245 (1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an ‘assault.’.

<sup>944</sup> *Lergesner v Carroll* [1991] 1 Qd R 206.

<sup>945</sup> *Re Attorney-General's Reference (No 6 of 1980)* [1981] 1 QB 715. In that case Lord Lane said: ‘It is not in the public interest that people should try to cause, or should cause, each other bodily harm for no good reason. Minor struggles are another matter. So, in our judgement, it is immaterial whether the act occurs in public or private; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.’

<sup>946</sup> *Holmes* [1993] 2 Tas R 232. Justice Wright J states: ‘I am compelled to the conclusion that the law of Tasmania as expressed in the Code s182(4), coincides with the principle established by the English and Canadian decisions’.

with the government and the community's concerns, in regards to stamping out street violence.

It therefore might be worthwhile for Queensland legislators to turn their attention to a law that seemingly allows consensual fist fighting that can result in broken bones and other injuries, without criminal sanction.<sup>947</sup> This might serve as an indication of the Government's opposition to unnecessary violence, and add to a consistency of the law with other States. Also, as was observed in the Canadian case of *R v Jobidon*, 'the so called consents to fist fights are often more apparent than real, and are obtained in an atmosphere where reason, good sense and even sobriety are absent'.<sup>948</sup>

Therefore, an offence of unlawful assault causing death, that would reintroduce the undesirable excuse of consent in death cases, would seem to be an unwarranted anomaly. Another problem with the Bill, was that the maximum penalty for the offence proposed (seven years) is less than the current penalty for grievous bodily harm (fourteen years). While this incongruity may be overcome by simply increasing the maximum penalty to exceed the sentence for grievous bodily harm, then there really is no reason to prefer it to manslaughter. Interestingly, the Bill did not propose the introduction of the new offence as a statutory alternative to murder or manslaughter.

However, as detailed below, a change of government in Queensland has meant there is now a statutory alternative to murder and manslaughter that is called: 'Unlawful Striking causing death' brought in to deal specifically with 'one punch' killings under the *Safe Night Out Legislation Amendment Act 2014*.<sup>949</sup> Like McArdle's Bill of 2007, it excludes the defence of 'accident', but it increases the maximum penalty to life imprisonment, with the offender required to serve 80 per cent of their sentence of imprisonment, before being able to apply for parole.<sup>950</sup>

---

<sup>947</sup> In *R v Donovan* [1934] 2 KB 498: bodily harm included: a fractured bone, a broken nose, severe bruising or burning, a deep cut or cuts or multiple minor injuries.

<sup>948</sup> *R v Jobidon* [1988] 45 CCC (3<sup>rd</sup>) 176, 184.

<sup>949</sup> Unlawful Striking causing death, *Safe Night Out Legislation Amendment Act 2014* (Qld) s 302A.

<sup>950</sup> *Ibid* (5).

Whether, as the QLRC and the Chief Justice of Queensland have pointed out when the issue of alternative sentences was first raised, there is the possibility that if an alternative verdict is left open to the jury, it may place them under pressure to compromise, is now open to question.<sup>951</sup> On the other hand, *R v Foster* identified the risk that a jury faced, with a choice between convicting a defendant and acquitting him altogether, the jury may unconsciously allow its decision to be influenced by considerations, extraneous to the evidence, and convict of the more serious charge rather than acquit altogether.<sup>952</sup>

Furthermore, if an alternative verdict is fairly open on the evidence, it is the duty of the trial judge to instruct the jury on it, and to equip them with appropriate directions to consider the alternative charges as a failure to do so may result in a successful appeal.<sup>953</sup> But, as the QLRC has pointed out, a trial on an indictment charging murder, with assault causing death as an alternative, would involve complicated directions to the jury.<sup>954</sup> For example, the jury, in a case of a person charged with murder following a ‘one punch’ killing, may receive directions about provocation, self-defence and intoxication. For manslaughter, a jury would receive directions about a lack of foreseeability and self- defence. But for the indictment alternative of unlawful striking causing death, a jury would only receive directions about self-defence. This situation is seemingly at odds with the judiciary’s general aspiration to deliver trial directions easily understandable to a jury.

## Fig 2. Current State and Territory Laws concerning fatal assaults

Western Australia s 281 <i>Criminal Code 1913</i> (WA) – Unlawful assault causing death
<p>(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.</p> <p>(2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.</p>

<sup>951</sup> Queensland Law Reform Commission, above n 1, 106; De Jersey, above n 229, 70.

<sup>952</sup> *R v Foster & Ors* [2007] EWCA Crim 2869, 614.

<sup>953</sup> *R v Coutts* [2006] 1 WLR 2154.

<sup>954</sup> Queensland Law Reform Commission, above n 1, 106.

**Northern Territory** s 161A *Criminal Code 1983* (NT) – Violent act causing death

- (1) A person (the ***defendant***) is guilty of the crime of a violent act causing death:
- a. The person engages in conduct involving a violent act to another person (the ***other person***); and
  - b. That conduct causes the death of:
    - (i) The other person; or
    - (ii) Any other person.
- Maximum penalty: Imprisonment for 16 years.
- (2) Strict liability applies to subsection (1)(b).

**New South Wales** s 25A *Crimes Act 1900* (NSW) – Assault causing death

- (1) A person is guilty of an offence under this subsection if:
- a. The person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
  - b. The assault is not authorised or excused by law, and
  - c. The assault causes the death of another person.
- Maximum penalty: Imprisonment for 25 years.

**Queensland** s 302A *Criminal Code 1899* (Qld) – Unlawful striking causing death

- (1) A person who unlawfully strikes another person to the head or neck, causing the death of another person, is guilty of a crime.  
Maximum penalty: Life imprisonment.
- (2) Sections 23(1)(b) and 270 do not apply to an offence against subsection (1).
- (3) An assault is not an element of an offence against subsection (1).
- (4) A person is not criminally responsible for an offence against subsection (1) if the act of striking the other person was –
- a. Done as part of a socially acceptable function or activity;
  - b. Reasonable in the circumstances.
- (5) If a court sentences a person to a term of imprisonment for an offence mentioned in subsection (1), the court must make an order that the person must not be released from imprisonment until the person has served the lesser of –
- a. 80% of the person's term of imprisonment for the offence, or
  - b. 15 years.

**Victoria s 4A Crimes Act 1958 (Vic) Manslaughter – single punch or strike taken to be dangerous act**

- (1) This section applies to a single punch or strike that –
  - a. Is delivered to any part of a person’s head or neck; that
  - b. By itself causes an injury to the head or neck.
- (2) A single punch or strike is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.
- (3) For the purposes of subsection (2) it is irrelevant that the single punch or strike is one of a series of punches or strikes.
- (4) A single punch or strike may be the cause of a person’s death even if the injury from which the person dies is not the injury that the punch or strike itself caused to the person’s head or neck but another injury resulting from an impact to the person’s head or neck, or to another part of the person’s body, caused by the punch or strike.
- (5) Nothing in this section limits the circumstances in which a punch or strike may be an unlawful and dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.
- (6) In this section –
  - “injury” has the same meaning as in Subdivision (4);
  - “strike” means a strike delivered with any part of the body.

**8.2.1 Western Australia - Unlawful assault causing death**

*Minimum penalty – imprisonment for 10 years*

Western Australia introduced a new offence of Unlawful assault causing death in 2008. It took effect on 1 August 2008, when a new section 281 was inserted into the Criminal Code (WA).

*s 281 Unlawful assault causing death*

- (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

As in Queensland, its intention was to deal with ‘one punch’ cases following similar community concerns raised by politicians and the media. Two cases in particular captured public attention.

In 2006, Shawn Perella and Neil Collette were at Coolbellup Hotel, where they were among hundreds who had gathered to drink heavily and watch a boxing match. Perella



‘king hit’ and killed Collette while in a rage, because Collette had ‘insulted’ him by lending Perella’s girlfriend a mobile phone. The jury found Perella not guilty of manslaughter, but guilty of the lesser charge of causing grievous bodily harm.<sup>955</sup> The second case was a particularly brutal assault upon a policeman two years later, that really ignited the campaign concerning ‘one punch’ violence in Western Australia. Additionally, the incident was captured on a mobile phone and subsequently released to the media which had its usual galvanising effect. The matter did not involve a death but grievous bodily harm, and self-defence rather than accident, was the major issue. Police had been called to attend a fight outside a pub in the town of Joondalup. A Police Constable was struck by a flying head-butt and knocked unconscious by the son of a man, at whom the Constable had fired a Taser gun. The Constable suffered brain damage, partial paralysis, and visual impairment as a result of the assault.

#### **a) Reinforcement of community expectations**

In the second reading speech of the Bill, the Attorney-General, Mr James McGinty, said that the new offence would reinforce community expectations that violent attacks, such as a blow to the head, were not acceptable behaviour, and would ensure that people were held accountable for the full consequences of their violent behaviour.<sup>956</sup> Although, as I have noted above, the new offence was not supported by the Western Australian Law Reform Commission.<sup>957</sup> Under s 281, a person is liable to imprisonment for 10 years.

The new offence has been operational in Western Australia for six years (at time of writing). Twelve people have been convicted of unlawful assault causing death since 2008; eleven were adults who all served gaol time.<sup>958</sup> However, there is little evidence about its effect on ‘one punch’ killings. McGinty said there has been a drop in the

---

<sup>955</sup> ABC TV, ‘Man cleared of one punch manslaughter charge’ *ABC News*, 27 March 2008, <http://www.abc.net.au/news/2008-03-27/man-cleared-of-one-punch-manslaughter-charge/2385088>.

<sup>956</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, (James McGinty) 1210.

<sup>957</sup> Western Australia Law Reform Commission, above n 260, 91.

<sup>958</sup> Current as at 01 January 2014.

number of typical ‘one punch’ deaths since the new law was introduced, but that might be due to the higher awareness of the risks of ‘king-hits’.<sup>959</sup>

While no one seems to oppose holding ‘one punch’ killers accountable, women’s and human rights advocates have raised concerns over the new law,<sup>960</sup> noting that since the unlawful assault causing death offence was enacted, the majority of convictions have been against men who have killed their partners or ex-partners. In these cases, offenders have been charged with unlawful assault causing death, where there has been a history of violence and abuse between the victim and the perpetrator.<sup>961</sup> The maximum penalty for unlawful assault causing death is 10 years. However, convictions to date in cases involving domestic violence have resulted in sentences of two to five years.<sup>962</sup>

#### **b) Human Rights concerns over sentencing**

The Human Rights Law Centre considers the extremely short sentences that have been applied to perpetrators of domestic violence homicide in accordance with the unlawful assault causing death offence, may constitute a violation of the right to life and the associated obligations under several international human rights laws (for example, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*), which contain comprehensive prohibitions on discrimination, which have been found to encompass gender-based violence to ensure the right to life is on an equal basis between men and women.<sup>963</sup> The Centre also points out that, while the unlawful assault causing death offence is expressed in gender-neutral terms, it was introduced to respond to acts of public violence (primarily affecting men)

---

<sup>959</sup> Sharona Coutts, ‘One Punch Can Change Your Life – And Hundreds of Others’, *The Global Mail*, (London) 19 July 2012.

<sup>960</sup> Rachel Ball, ‘Human rights implications of ‘unlawful assault causing death’ laws’, Briefing Paper, *Human Rights Law Centre*, Melbourne, 14 March 2012; *The Women’s Council for Domestic and Family Violence Services* (WA), ‘Petition in Relation to the Laying of Charges in Case of Deaths Resulting From Domestic Violence’, (Petition 161, 12 September 2012); Jane Cullen, ‘WA’s ‘One-Punch’ Law: Solution To A Complex Social Problem Or Easy Way Out For Perpetrators Of Domestic Violence?’ (2014) 2(1) *Griffith Journal Of Law & Human Dignity* 52; Jennifer Porter, ‘The Implications of Uncertainty in the Law of Criminal Causation for the One-Punch Homicide Offence in Western Australia’ (2015) 27(1) *Bond Law Review* 6-25.

<sup>961</sup> See, Office of the Director of Prosecutions (WA), ‘Summary of convictions under s 281 of the *Criminal Code 1913*(WA)’ (Western Australia, 28 August 2012), [http://www.dpp.wa.gov.au/files/assault\\_occasioning\\_death.pdf](http://www.dpp.wa.gov.au/files/assault_occasioning_death.pdf).

<sup>962</sup> Ibid

<sup>963</sup> Ball, above n 907, 4.

and does not reflect the different circumstances and severity of domestic violence (which primarily affects women).<sup>964</sup>

This means that the Western Australian criminal law system currently responds to domestic violence homicides as though they are equivalent to a ‘one punch’ homicide, and offenders are sentenced accordingly. Public dissatisfaction with the law was expressed when a petition containing 2,500 signatures, in relation to the laying of charges in cases of deaths resulting from domestic violence, was presented to Legislative Council in Western Australia by the Women’s Council for Domestic and Family Violence Services (WA) on May 3, 2012.

According to McGinty, the law was never intended to be used in situations of domestic violence, and if it was being used as a ‘soft option’, then it was a misuse of the law.<sup>965</sup> But as the Western Australian Director of Public Prosecutions, Joseph McGrath, explained, the State only opts for a ‘one punch’ prosecution if there is not enough evidence to pursue more serious charges.<sup>966</sup> There is little doubt that the State, generally speaking, regards contraventions of unlawful assault causing death as less serious than the offence of manslaughter, and this has been acknowledged by the Courts.<sup>967</sup>

An illustration of the difficulties facing prosecutors and law reformers alike can be found in the case of *The State of Western Australia v Jones*.<sup>968</sup> The offender, Jones, assaulted his estranged wife, Saori, by punching her in the temple with his clenched fist, causing her to fall to the ground. According to the prosecution, he then continued to attack her as she lay on the floor until the cries of his four-year-old child caused him to stop. The offender then carried her to the bedroom and covered her with a blanket. At that stage she was reportedly alive, but when the offender went to check on her the following morning he found that she had died during the night. The victim was not discovered by police until some 12 days after the attack. By that time the body of the

---

<sup>964</sup> Ibid, 3.

<sup>965</sup> Quoted in Coutts, above n 906.

<sup>966</sup> Ibid.

<sup>967</sup> *Western Australia v JWRL* [2010] WASC 392.

<sup>968</sup> *Western Australia v Jones* [2011] WASC 136.

victim was so badly decomposed an autopsy could not determine the cause of death. After some prevarication, the offender eventually confessed that he had assaulted the victim and she had died. He pleaded guilty to one count of unlawful assault occasioning death, and was sentenced on the basis that he did not intend to do the victim serious harm and that her death was not foreseeable. The State agreed with the factual basis of his plea, and he was sentenced to five years imprisonment, with parole eligibility after three years.

A suggestion that Jones could have faced a more serious charge was dismissed by Western Australia's Director of Public Prosecutions, Murray Cowper. He told the media the Director of Public Prosecution's advice at the time was that unlawful assault occasioning death was the appropriate charge.<sup>969</sup> Angela Hartwig, the Chief Executive Officer of the Women's Council for Domestic and Family Violence Services (WA), criticised what she described as the leniency of the sentence, and called for the charge of unlawful assault occasioning death to be abandoned in relation to domestic violence homicides, as it constituted impermissible discrimination, and a failure to act with due diligence, in responding to violence against women.<sup>970</sup>

The Women's Council's concerns over the sentence are understandable but so too is the Director of Public Prosecution's decision to accept a plea of guilty for unlawful assault occasioning death, instead of prosecuting a charge of murder or manslaughter. If the new law was not in place, there would be every chance that had the accused utilised the excuse of accident at trial, (accident is not available as a defence in a s 281 offence) then a jury may have acquitted him altogether, given the Director of Public Prosecution could not determine the cause of death. This would not be the outcome that those concerned with violence against women would accept.

### **c) Private Member's Bill calls for increased penalties**

The community concern led to the Western Australian Opposition introducing a private member's bill which would have seen increased penalties for those who kill their partners. The Criminal Code Amendment (Domestic Violence) Bill 2012, known as

---

<sup>969</sup> ABC TV, 'A Matter of Life and Death' *Four Corners*, 30 July 2012 (Quentin McDermott).

<sup>970</sup> Women's Council for Domestic and Family Violence Services (WA), 'Unlawful Assault Causing Death'; Justice System fails victims of domestic and family violence' (Media Release, 3 May 2012)

‘Saori’s Law’ after Saori Jones, would have increased the maximum penalty for those convicted of assault resulting in death in ‘circumstances of aggravation’ (as defined in s 221 of the *Criminal Code*) from 10 to 20 years, the same as for manslaughter.<sup>971</sup> Family and domestic violence was considered a ‘circumstance of aggravation’ under this section. The aim of the legislation was said: ‘to ensure that the seriousness of domestic violence offences is reflected in the sentencing process and send a powerful message to perpetrators that their violence is a serious ‘law and order’ issue and will be punished accordingly’.<sup>972</sup> The Bill was defeated on party lines, however the Labor Opposition party committed itself to ensuring its passage through the Western Australian Parliament after gaining office in its first term.<sup>973 974</sup>

There are also other cases where the offence of unlawful assault occasioning death seems to be an appropriate charge. For example, *The State of Western Australia v Lillias*, where an Aboriginal man, under duress, stabbed to death his brother-in-law as ‘tribal payback’.<sup>975</sup> The facts were that Tristan Lillias killed his brother-in-law at a remote Aboriginal community, by stabbing him in the upper left thigh. Lillias was initially charged with manslaughter; however, it was downgraded to unlawful assault occasioning death, to which he pleaded guilty. According to the sentencing remarks, the ‘tribal payback’ was called for after the victim’s wife was found hanging from a tree outside her home. Afterwards, the community went into grieving, and Lillias was pressured to stab his victim as a form of tribal punishment, and was told if he did not, he would be ‘put in a wheelchair’. Judge Jenkins accepted that Lillias had only committed the offence because he was threatened with physical injury, and that he did not intend, nor did he think the deceased would die. He was sentenced to 18 months suspended imprisonment, which took into account the nine months or so he had already served while on remand.<sup>976</sup>

---

<sup>971</sup> Criminal Code Amendment (Domestic Violence) Bill 2012 (WA).

<sup>972</sup> Ibid.

<sup>973</sup> ‘Saori’s Law defeated’ *In My Community* (online), 30 October 2012, <http://comment.inmycommunity.com.au/news-and-views/local-news/Saoris-Law-defeated>

<sup>974</sup> Ibid.

<sup>975</sup> *Western Australia v Lillias* [2012] WASCR 100.

<sup>976</sup> Ibid.

While there would be some in the community who would think manslaughter should have been the appropriate charge, the Crown could well have weighed up the possibility that a jury, properly instructed, could have brought down a not guilty verdict for manslaughter, on the basis the fatal injury was not foreseen by the offender, and would not have been foreseen by a reasonable person. Therefore, by bringing the lesser charge, they secured an early guilty plea, while the victim's family could gain some solace that the law had acknowledged a life had been lost.

### 8.2.2 *Northern Territory – Violent act causing death*

Notwithstanding Western Australia's apparent difficulties with unlawful assault occasioning death, and other states' rejection of a similar offence, the Northern Territory government has amended the Northern Territory Criminal Code to include an offence of Violent Act causing death, which is similar to unlawful assault causing death.<sup>977</sup> It reads:

*N T Criminal Code 1983 - 161A Violent act causing death*

- (1) A person (the **defendant**) is guilty of the crime of a violent act causing death if:
  - (a) The person engages in conduct involving a violent act to another person (the **other person**); and
  - (b) That conduct causes the death of:
    - (i) the other person; or
    - (ii) any other person.

Maximum penalty: Imprisonment for 16 years.

- (2) Strict liability applies to subsection (1)(b).

While in Opposition, Shadow Attorney-General John Elferink said a Country Liberal Party (CLP) government would introduce the laws by Christmas 2012, if elected.<sup>978</sup> After coming into government in August 2012, the CLP referred the matter to the Northern Territory Law Reform Committee, presided over by the former Chief Justice

---

<sup>977</sup> Criminal Code Amendment (Violent Act Causing Death) Bill 2012 (NT) (Serial 3) (one punch legislation). It was introduced into Parliament on 1 November 2012.

<sup>978</sup> Ellie Turner, 'One Punch' crowd rallies', *ntnews.com.au*, (online) 21 August 2012, [http://www.ntnews.com.au/article/2012/08/21/313027\\_ntnews\\_pf.html](http://www.ntnews.com.au/article/2012/08/21/313027_ntnews_pf.html)

Asche.<sup>979</sup> The consultation process was not extensive, as the legislation was enacted in late November and began operating in January 2013.<sup>980</sup>

#### **a) General objective of the legislation**

According to the Northern Territory government, the offence was enacted to fill a gap in the law. They claim the ‘gap’ may exist, where a person has killed another person in circumstances where it is not possible to prosecute the offender for manslaughter or murder. Under the previous law the appropriate charge was assault, which has a much lower maximum penalty than the 16 year penalty provided for in the Bill. Juries will not be able to convict a person under s 161A as an alternative to manslaughter. The *Sentencing Act* was amended to insert this offence into Schedule 2 to that Act. This makes sure that a person found guilty must serve a period of imprisonment, if this offence is the offender’s second or subsequent finding of guilt for a violent offence.

#### **b) Main provisions of the legislation**

Section 161A(2) states that the fault element for causing the death of the person or other person, is strict liability. This means, in respect of the physical element of the offence, that there is only a need to prove the death. For the purposes of the new offence, ‘conduct involving a violent act’ is defined in s 161A(5) as conduct involving the direct application of force of a violent nature, whether or not an offensive weapon is used in the application for force. This includes a blow, hit, kick, punch and strike. Section 161A(1)(b) requires proof that the conduct engaged in caused the death of the person the violent act was directed at, or any other person. That is, the violent act does not need to have been directed at the person who has died. For example, a person may try to punch one person but instead punch a bystander who dies as a result.

In 2005, the Legislative Assembly passed important amendments to the Criminal Code, which saw the adoption of principles for criminal responsibility, based on the Uniform

---

<sup>979</sup>The Northern Territory Law Reform Committee is a non-statutory committee established to advise the Attorney-General, the Hon John Elferink MLA, on the reform of law in the Northern Territory. The Committee consists of the Chair, currently the Hon. Austin Asche AC QC, and 12 other members including the Chief Magistrate, the Ombudsman, the Executive Officer of the Law Society, members of the legal profession, academic staff of the Northern Territory University including at least one member from the Faculty of Law, a representative of the Police Force and a member from an Aboriginal body.

<sup>980</sup> *Criminal Code (Violent Act Causing Death) Amendment 2012* (NT) was enacted in November 28 2012.

Model Criminal Code. The Model Criminal Code is framed so as to cover the field of criminal responsibility for homicide. One of the key elements of these reforms was the abolition of the offence of ‘dangerous act causing death’, which had been widely criticised for allowing many defendants to escape manslaughter and receive what was thought to be an unfairly lenient sentence. As the Criminal Lawyers Association of the Northern Territory has pointed out, an obvious danger of the proposed new ‘one punch’ homicide law would be that this problem would be recreated.<sup>981</sup>

The reason for this change in law appears to have come from community reaction to a few tragic cases in the run-up to the Northern Territory Legislative Assembly elections on 25 August 2012. The most notorious of these cases involved the death of an off-duty policeman, Brett Meredith, who was killed while ringing in the New Year in 2010. According to police evidence, Meredith became involved in a scuffle with the accused, Michael Martyn, who ‘king-hit’ Meredith while he was looking in another direction. The cause of Meredith’s death was a fracture of the skull, caused when his head hit the concrete floor.<sup>982</sup>

Following a trial, Martyn, who had a history of violence, was convicted of manslaughter and sentenced to imprisonment for three years and eight months, with a non-parole period of one year and ten months.<sup>983</sup> The victim’s family were reportedly ‘shattered’ by what they thought was the lightness of the sentence.<sup>984</sup> Following a successful appeal by the Crown, Martyn’s original sentence was set aside and replaced with a period of imprisonment of five years and the non-parole period increased to two years and six months.<sup>985</sup>

---

<sup>981</sup> President, Criminal Lawyers Association (NT), Russell Goldflam, ‘One punch homicide law equals one punch policy’, (Media release, August 20, 2012).

<sup>982</sup> *R v Martyn* [2011] NTSC.

<sup>983</sup> *Ibid.*

<sup>984</sup> Meagan Dillon, ‘Family ‘shattered’ by cop killer sentence’, *Northern Territory News* (online), 20 July 2011, <http://www.ntnews.com.au>.

<sup>985</sup> *The Queen v Martyn* [2011] NTCCA 13 (16 November 2011).



Following the Appeal, Meredith's widow launched a campaign to have the new legislation implemented in the Northern Territory.<sup>986</sup> Public rallies were instigated, which attracted significant media attention.<sup>987</sup> It was as a result of this public pressure that the CLP introduced its legislative amendments as part of its policy to reduce crime by 10 per cent.<sup>988</sup> Although it is interesting to note that the Northern Territory Labor leader at the time, Paul Henderson, voiced his criticism of the 'one punch' legislation proposal.<sup>989</sup> Henderson said the lesser sentence would detract from life sentences for murder or manslaughter, and he wanted to ensure 'it wasn't a soft option for lawyers' before he endorsed it.<sup>990</sup> This is a good point, as manslaughter in most jurisdictions attracts a maximum life sentence, which in the Northern Territory means twenty years, and are among the toughest laws in the country, while the proposed new legislation only attracts a maximum of 16 years and, judging by the Western Australian experience, first-time offenders are not likely to receive anything near the maximum.

In any event, it must be noted that the trial of the man who caused Brett Meredith's death resulted in a conviction for manslaughter and a reasonably lengthy prison sentence. As the Northern Territory Criminal Lawyers Association said, if that case illustrates anything, it is that the current law works.<sup>991</sup> Had Meredith's killer been charged under the new legislation, it is quite likely he would have received a lesser sentence, which is the exact opposite of what the government is allegedly trying to achieve.

### **8.2.3    *New South Wales - Assault causing death***

New South Wales became the latest state to introduce new Assault causing death legislation when it introduced the Crimes and Other Legislation Amendment (Assault

---

<sup>986</sup> Amee Meredith, 'All of this because of one punch – one senseless punch', (online), 21 August 2012, <http://www.heraldsun.com.au/news/national/it-just-took-one-senseless-punch-to-kill-brett/story-fndo48ca-1226455133989>.

<sup>987</sup> Turner, above n 925.

<sup>988</sup> Clare Rawlinson, 'Alcohol policies stir concern over domestic violence spike', *Australian Broadcasting Commission* (online), August 2012, <http://www.abc.net.au/local/stories/2012/08/02/3558982.htm>.

<sup>989</sup> Turner, above n 925.

<sup>990</sup> Ibid.

<sup>991</sup> Russell Goldflam, above n 928.

and Intoxication) Bill 2014.<sup>992</sup> The Bill, which was passed by Parliament and supported by the Opposition, legislates for even more severe sentences than those enacted in Western Australia and the Northern Territory by imposing a maximum sentence of 20 years for an assault causing death, and a maximum of 25 years and a minimum of eight years if the offender commits the offence when intoxicated.<sup>993 994</sup>

*NSW Crimes Act 1900 – 25A Assault causing death*

- (1) A person is guilty of an offence under this subsection if:
- (a) The person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
  - (b) The assault is not authorised or excused by law, and
  - (c) The assault causes the death of another person.

Maximum penalty: Imprisonment for 20 years.

- (2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated.

Maximum penalty: imprisonment for 25 years.

The Act proscribes that there will be a conclusive presumption of intoxication if the accused has more than 0.15mls concentration of alcohol following a breath or blood sample analysis.<sup>995</sup> This raises a couple of interesting issues. First, in determining whether a person is intoxicated, s 25A(6) allows police to subject an accused person to 'tests' to determine the concentration of alcohol or drugs in their breath, blood or urine at the time of the alleged offence. Secondly, a person is presumed intoxicated if the prosecution prove that the person had a breath or blood concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100mls of blood. Therefore, an interesting issue that will arise, is when the person was not apprehended until the next day or even later: What evidence will be available that the offender was intoxicated at the time of the offence? This will undoubtedly be a key issue for the defence, raising the questions

---

<sup>992</sup> The Bill was tabled by the NSW Premier, Barry O'Farrell, on 30 January 2014 and was passed by the Parliament with the support of the Labor Opposition, NSW Government, 'One Punch Assault Laws Pass Parliament', (Media release, 30 January 2014), <https://www.nsw.gov.au/news/one-punch-assault-laws-pass-parliament>.

<sup>993</sup> *Amendment of Crimes Act 1900 No 40 s 25A Assault causing death.*

<sup>994</sup> Mandatory minimum sentence *Amendment of Crimes Act (No 40) 1900* (NSW) s 25B Assault causing death when intoxicated.

<sup>995</sup> *Amendment of Crimes Act (No 40) 1900* (NSW) s 25A (6)(b).

such as. Was the person ‘intoxicated’ at the time of the offence? What does ‘intoxicated’ mean? Will objective evidence from witnesses be sufficient to establish ‘intoxication’? It is also not necessary for the prosecution to prove that the death was reasonably foreseeable.<sup>996</sup> This removes any defence based on ‘accident’ or unforeseeability.

How the new charges play out will become clearer when the only offender so far to face the charge of assault causing death while intoxicated, is dealt with by the courts.<sup>997</sup> In tabling the Bill, then Premier Barry O’Farrell said its purpose was ‘to make our streets safer by introducing new measures to tackle drug and alcohol-related violence’.<sup>998</sup> These comments followed public criticism that the Premier was not ‘in touch’ with community concern over a spate of what was described as ‘drunken and drug-fuelled violence’.<sup>999</sup>

The Act is not restricted to ‘one punch’ offences and applies to death from brawls more generally. For example, it says nothing about a ‘coward punch’ or ‘king hit’ in either section, neither does it speak directly regarding ‘one punch’. The ‘hit’ described in s 25A(1) could be more than one hit. It is also cognate with the Liquor Amendment Bill 2014, which contains the boundaries of the Sydney Central Business District (CBD) Entertainment Precinct where new 1:30am lockouts and 3.00am ‘last drinks’ rules will apply. Furthermore, the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act (No 2) 2014* (NSW) increases the penalty notice fines for summary

---

<sup>996</sup> *Amendment of Crimes Act (No 40) 1900* (NSW) s 25A (4).

<sup>997</sup> Emma Partridge, ‘Hugh Garth to face new one-punch law over Raynor Manalad’s death’, *Sydney Morning Herald* (Sydney), 7 May 2014,

<sup>998</sup> Anna Patty and Nicole Hasham, ‘Bill to combat brawl deaths sets blood-alcohol level at .15 for ‘intoxication’, *Sydney Morning Herald*, (Sydney) 30 January 2014, <http://www.smh.com.au/nsw/bill-to-combat-brawl-deaths-sets-bloodalcohol-level-at-15-for-intoxication-20140130-31oh9.html>

<sup>999</sup> Editorial, ‘Tardy Premier takes back control of alcohol scourge’, *Sydney Morning Herald*, (Sydney) 21 January 2014, <http://www.smh.com.au/action/printArticle?id=5093939>

offences often associated with excessive alcohol consumption, such as offensive conduct or language in a public place and failure to comply with move on directions.<sup>1000</sup>

#### **a) Criticism of new legislation**

This new legislation has attracted much of the same sort of criticism that the Western Australian and Northern Territory unlawful assault legislation has, namely that there is no credible evidence that enacting tougher laws will reduce street violence.<sup>1001</sup> It is also arguable whether the legislation has attracted the support of the New South Wales public for whom it was supposedly enacted. A straw poll (admittedly unscientific) conducted by the MSN Australia website posing the question: ‘Are the new alcohol-fuelled violence laws working?’ resulted in a more than a two-thirds majority negative vote from respondents.<sup>1002</sup> However, most of the opposition from the legal profession centred on the mandatory sentencing element of the new legislation.<sup>1003</sup>

It is not difficult to think of unjust outcomes that could arise from a mandatory sentencing regime. Take, for example, an 18-year-old with no criminal record who is drinking in a bar when a drunken stranger hurls an insult at his girlfriend. After further taunts, the young man hits the stranger, who trips, hits his head on the floor and dies. Under the New South Wales laws, the alcohol-affected teenager would receive a mandatory minimum sentence of eight years in gaol if convicted of landing the fatal blow. However, if a member of a ‘bikie’ gang with a criminal history does the same thing to a rival gang member while completely sober, he escapes the mandatory minimum sentence.

---

<sup>1000</sup> *Amendment of Summary Offences Act (No 25) 1988* (NSW) Sch 5; Criminal Procedure Regulation 2010 (NSW); Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 (NSW).

<sup>1001</sup> Nicholas Cowdery, ‘Caution urged in alcohol-violence counter measures’, *Sydney Morning Herald*, (Sydney) 22 January 2014, <http://www.smh.com.au/comment/caution-urged-in-alcohol-violence-counter-measures-20140121-316tp.html>

<sup>1002</sup> Poll, ‘Are the new alcohol-fuelled violence laws working’ Yes: 7,392. No: 24,291, *Ninemsm* (online) (4 July 2014), [www.ninemsn.com.au](http://www.ninemsn.com.au)

<sup>1003</sup> Michaela Whitbourn, ‘Legal eagles punch holes in mandatory sentence plan’, *Sydney Morning Herald*, (Sydney) 23 January 2014, <http://www.smh.com.au/nsw/legal-eagles-punch-holes-in-mandatory-sentence-plan-20140122-31965.html>. Richard Ackland, ‘Prongs of Premier Barry O’Farrell’s alcohol plan aren’t very sharp’, *Sydney Morning Herald* (Sydney), 24 January 2014, <http://www.smh.com.au/comment/prongs-of-premier-barry-ofarrells-alcohol-plan-arent-very-sharp-20140123-31bk8.html>

It is unclear though whether the minimum penalty is intended to apply generally to most offences that are the subject of the mandatory minimum, or if it is only a minimum for the least serious cases. Furthermore, not only do the new laws remove judicial discretion in sentencing, but there is no indication that the mandatory minimums will include a non-parole period, reducing the gaol time that would have to be served. Other questions that arise are: whether the minimum sentence applies in circumstances where the offender has pleaded guilty, or has provided assistance to the authorities? Will juries convict in circumstances where they know that particular penalties will be imposed regardless of the circumstances in issue? And, will the imposition of a minimum sentence be a disincentive to early guilty pleas?

#### **b) No public consultation process**

Unlike Queensland, Western Australia and, to some extent, the Northern Territory, the New South Wales Government did not hold a public consultation process concerning the need for new laws. This lack of process leaves itself open to criticism that the new laws are the result of a knee-jerk reaction to public opinion, as outlined in Chapter Four on Community expectations. On the other hand, the Government may draw some comfort from the latest New South Wales Bureau of Crimes Statistics and Research figures which report assaults within licensed premises were down 5.6 per cent state-wide, 15.1 per cent in Sydney and more than 30 per cent in the Kings Cross area.<sup>1004</sup> Bureau director, Dr Don Weatherburn said however, it was too early to know if the new lockout laws have had an impact.<sup>1005</sup> He said, however, a range of responsible service of alcohol initiatives, including enforcing the use of plastic cups, and restrictions on the number of drinks sold, had reduced violence.<sup>1006</sup>

---

<sup>1004</sup> New South Wales Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics March 2014 quarterly report*, (Report, 2 June 2014)21.

<sup>1005</sup> Nick Ralston, 'Assault rate rises in NSW homes', *Sydney Morning Herald*, (Sydney) 3 June 2014, <http://www.smh.com.au/national/assault-rate-rises-in-nsw-homes-20140602-39et5.html>; Dr Don, Weatherburn New South Wales Bureau of Crimes Statistics and Research, 'Lockouts and Last Drinks: The Impact of the January 2014 Liquor Licence Reforms on Assaults in NSW, Australia (Media Release, 16 April 2015).

<sup>1006</sup> Ibid.

#### 8.2.4 *Queensland - Unlawful Striking causing death*

In March 2014 the then Liberal National Party (LNP) Government announced a draft Action Plan to counter what it described as alcohol and drug-fuelled violence in Queensland, especially at the state's nightspots.<sup>1007</sup> Among the measures proposed was the introduction of tougher penalties for those affected by alcohol or drugs and who engage in anti-social and violent behaviour in and around licensed venues and in public. The Government moved quickly because by June 2014 the Safe Night Out Legislation Amendment Bill 2014 was presented to Parliament and enacted three months later.<sup>1008</sup> The new legislation includes amending s 300 (unlawful homicide) of the Criminal Code,<sup>1009</sup> and inserting a new section 302A unlawful striking causing death:

##### *Qld Criminal Code 1899 – 302A Unlawful striking causing death*

- (1) A person who unlawfully strikes another person to the head or neck, causing the death of the other person, is guilty of a crime.

Maximum penalty – life imprisonment.

- (2) Sections 23(1) (b) and 270 do not apply to an offence against subsection (1).

- (3) An assault is not an element of an offence against subsection (1).

- (4) A person is not criminally responsible for an offence against subsection (1) if the act of striking the other person was-

- (a) Done as part of a socially acceptable function or activity;

and

- (b) Reasonable in the circumstances.

- (5) If a court sentences a person to a term of imprisonment for an offence mentioned in subsection (1), the court must make an order that the person must not be released from imprisonment until the person has served the lesser of –

- (a) 80% of the person's term of imprisonment for the offence;

or

- (b) 15 years.

---

<sup>1007</sup> Queensland Premier Campbell Newman, 'Safe Night Out Strategy', (Media release, 23 March, 2014).

<sup>1008</sup> *Safe Night Out Legislation Amendment Act 2014* (Qld) passed through Parliament on 10 September 2014.

<sup>1009</sup> *Criminal Code 1899* (Qld) s 300 Unlawful homicide currently says 'Any person who unlawfully kills another is guilty of a crime, which is called murder, or manslaughter, according to the circumstances of the case'. Under the Amendments the words 'unlawful striking causing death or manslaughter' would be inserted after the word 'murder'.

According to the explanatory notes, the creation of the new offence of Unlawful striking causing death was to principally address the ‘coward-punch’<sup>1010</sup> homicide cases.<sup>1011</sup> Those convicted would be punishable by a maximum penalty of life imprisonment, with the offender required to serve 80 per cent of their sentence of imprisonment before being able to apply for parole.<sup>1012</sup> Like the New South Wales legislation, the Queensland laws introduces the spectre of mandatory sentencing which removes judicial discretion, and it does not address what sentence will apply in circumstances where the offender has pleaded guilty, or has provided assistance to the authorities? Also, will juries convict in circumstances where they know that particular penalties will be imposed, regardless of the circumstances in issue? And, will the imposition of a severe sentence be a disincentive to early guilty pleas?

**a) The excuse of accident abolished**

Significantly, the new offence precludes an accused from attempting to argue that, although the strike was unlawful, the death of the victim was an ‘accident’, as s 23(1)(b) does not apply, nor does s 270 Prevention of repetition of insult.<sup>1013</sup> Furthermore, s 302A(3) states ‘assault is not an element of an offence’, which means that the defence of provocation under ss 268 and 269 of the Criminal Code do not apply to the new offence.<sup>1014</sup>

In its submission to the Legal Affairs and Community Safety Committee regarding the *Safe Night Out Legislation Amendment Bill 2014 (Qld)*, the Queensland Law Society (QLS) noted its concern about the removal of the above provisions, providing the following illustration:

*A woman may receive repeated verbal insults and/or unwanted attention from a man in a bar. The woman may react by slapping that man in order to prevent repetition of*

---

<sup>1010</sup> This phrase has now been adopted by the Government and media to describe what are, in effect, ‘one punch’ killings or what are euphemistically known as ‘King Hits’.

<sup>1011</sup> Explanatory Notes 4, *Safe Night Out Legislation Amendment Bill 2014 (Qld)*.

<sup>1012</sup> Section 302A (5) (a) Unlawful striking causing death *Safe Night Out Legislation Amendment Act 2014 (Qld)*.

<sup>1013</sup> S 302A (2) Unlawful striking causing death *Safe Night Out Legislation Amendment Act 2014 (Qld)*.

<sup>1013</sup> S 302A (2).

<sup>1014</sup> Explanatory Notes 6, *Safe Night Out Legislation Amendment Bill 2014 (Qld)*.

*the insult. Not expecting the slap, the man may fall backward, hit his head on a hard surface and die.*<sup>1015</sup>

Under the current law, the woman might argue that she did not intend that her slap cause the death of the man. It may be argued that an ordinary person would not reasonably foresee death as a possible consequence of the slap. Under s 302A, the woman would not be able to rely on the excuse of accident and if convicted, face life imprisonment.

Concern has also been raised that the defence outlined in s 302A(4)(a) that, ‘a person is not criminally responsible, if the act of striking the other person was done as part of a socially acceptable function or activity’ may be so widely defined as to be problematic for both judges and juries, particularly given that no other defence in the Criminal Code requires a jury to consider the meaning of the phrase ‘socially acceptable’.<sup>1016</sup>

#### **b) Charging decisions**

There is also the potential for the Crown to avoid having to negative an appropriately raised defence of accident, by choosing to charge Unlawful striking causing death instead of manslaughter or, if the defence in s 302A(4) arises on the facts, choosing to charge manslaughter instead of unlawful striking causing death. In addition, as noted by the QLS, the new legislation is of an ‘omnibus nature’, which was previously criticised by the Queensland Parliamentary Legal Affairs and Community Safety Committee when it was considering the *Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012*.<sup>1017</sup> Here, the Committee noted that omnibus bills:

Arguably may breach the fundamental legislative principle in section 4 (2) (b) of the *Legislative Standards Act 1992* because they fail to have sufficient regard to Parliament, forcing Members to vote to support or oppose a bill in its entirety when that (omnibus) bill may contain a number of significant unrelated amendments to existing Acts that would more appropriately have been presented in topic-specific stand-alone Bills.<sup>1018</sup>

---

<sup>1015</sup> Queensland Law Society, ‘Submission to Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014 (Qld)’, 2014, Explanatory Notes 4.

<sup>1016</sup> Queensland Legal Aid, ‘Submission to Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014 (Qld)’, 4 July 2014, Explanatory Notes 2.

<sup>1017</sup> Queensland Law Society, ‘Submission to Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014 (Qld)’, 4 July 2014, Explanatory Notes 1.

<sup>1018</sup> Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012 (Qld) Report No. 18, Legal Affairs and Community Safety Committee, November 2012, Legal Affairs and Community Safety Committee, 5.



Nevertheless, the explanatory notes claim the new offence will fill a legislative gap and ensure that the community is protected from such cowardly acts of violence, but the notes do not provide any statistical research or convincing explanation into why the charge of manslaughter is not doing its job in securing convictions for deadly assaults.

<sup>1019</sup> It is also interesting to note that the new legislation only refers to a person who unlawfully strikes another person to the ‘head or neck’. This would seem to provide the anomalous situation that an offender who kills a person by a kick to the stomach, for example, could not be charged with unlawful striking causing death but manslaughter, and would therefore be able to avail themselves of the s 23(1)(b) excuse.<sup>1020</sup> Why unlawful striking to the head or neck is in need of more condign punishment than other forms of manslaughter has not been explained.

It is also not clear whether the new offence will have repercussions on other sections of the Code. For example, whether a s 576 indictment containing a count of murder or manslaughter might have to be amended to allow a jury to return a verdict on any appropriate alternative charge, notwithstanding the fact that all three offences contain a maximum sentence of life imprisonment. While amending the law does not provide unsurmountable problems, it is usually not a good thing for public understanding to be changing the law to suit new offences.

### **c) New law sees changes to Penalties & Sentences Act**

Furthermore, the Bill amends section 9 (Sentencing guidelines) of the *Penalties and Sentences Act 1992* (Qld) to insert a new subsection 9A to make it clear that voluntary intoxication by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing an offender. This seems incongruous, for, generally speaking, self-induced intoxication is never a mitigating factor, but merely an explanation in some cases for an offender’s conduct. Furthermore, it may prove unfair for the indigenous population. In *R v Fernando*, Wood J, after examining the authorities, said in relation to the Aboriginal society that ‘while drunkenness is not normally an excuse or mitigating factor, where

---

<sup>1019</sup> Safe Night Out Legislation Amendment Bill 2014 (Qld), Explanatory Notes 5.

<sup>1020</sup> This scenario did occur in a Canadian case *R v Smithers* [1978] 1 SCR 506, 34 CCC (2d) 427 where the victim died from a single kick to the stomach as a result of inhaling his own vomit. Furthermore the legendary *Houdini* was reputed to have died as the result of a blow to the abdomen. See Don Bell, *The Man Who Killed Houdini* (Vehicule Press, 2004).

the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor'.<sup>1021</sup>

Former Queensland Premier, the Honourable Campbell Newman, foreshadowed his government's intention early in 2014 to tackle alcohol and drug-fuelled violence, and since then have claimed more than 12,000 Queenslanders had provided feedback through an online survey.<sup>1022</sup>

#### **d) Lack of consultation**

The Government's consultation methods attracted criticism from the Queensland Coalition for Action on Alcohol (QCCA) then representative, Doctor Anthony Lynham, who accused the Government of taking its cues from social media rather than experts.<sup>1023</sup> He said the QCCA had called on the Government to introduce a 12 month state-wide reduction of trading hours modelled on the Newcastle alcohol restrictions, and that advice appeared to have been ignored.<sup>1024</sup> Furthermore, the QCAA said the draft action plan would not be effective in its current form. It appears that the then Newman Government did not take much notice of submissions made by the QLS, the Queensland Bar Association, the Aboriginal and Torres Strait Islander Legal Service and the Queensland Council for Civil Liberties, who all expressed opposition to the new legislation, in particular, the proposed offence of unlawful striking causing death and especially the removal of the excuse of 'accident' and the mandatory provisions contained within the legislation.<sup>1025</sup>

---

<sup>1021</sup> *R v Fernando* [1992] 76 A Crim R 58, 62-63.

<sup>1022</sup> Queensland Government, 'Safe Night Out Strategy' (Media release, 23 March, 2014), 7.

<sup>1023</sup> Sarah Vogler, 'Fatal coward punches to attract longer prison sentences under harsh new laws', (online), 23 March 2014, <http://www.couriermail.com.au/news/queensland/fatal-coward-punches-to-attract-longer-prison-sentences-under-harsh-new-laws/story-fnihsrf2-1226862195878>. This criticism was echoed by the Queensland Law Society in their submission to the Legal Affairs and Community Safety Committee hearing on the Safe Night Out Legislation Amendment Bill 2014. The Society said while it understood the Government's desire to garner community views on the issue, they considered that an online survey tool may produce limited quality data if the public was not furnished with the relevant information on which to base their views, Queensland Law Society, Submission to Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014 (Qld), 4 July 2014.

<sup>1024</sup> Ibid.

<sup>1025</sup> Queensland Law Society et al, 'Submission to Queensland Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014', July 4 2014.

The then Government also seems to have ignored the Queensland Law Reform Commission's voluminous report on 'Accident' some six years ago, which recommended against an alternative offence of unlawful assault, as did an even earlier Western Australian Law Reform Commission report.<sup>1026</sup>

#### **8.2.5 Victoria - Coward's Punch Manslaughter**

In August 2014 Victoria followed the above States with its 'one punch' legislation by introducing the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014. The Bill amends provisions in the *Crimes Act 1958* to provide that certain acts are taken to be dangerous acts for the purposes of unlawful and dangerous act manslaughter. It also amends the *Sentencing Act 1991* to provide statutory minimum sentences of 10 years imprisonment for manslaughter in certain circumstances. A new s 4A applies to a single punch or strike that is delivered to any part of a person's head or neck.

Injury takes its meaning from section 15 of the *Crimes Act 1958*, which describes physical injury as including 'Unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function'. According to the Explanatory Memorandum this will 'preclude acts such as a slight push or gentle slap from fitting within the new section'.<sup>1027</sup> The new s 4A(2) provides that a single punch or strike is taken to be a dangerous act. This will mean that in cases where the prosecution must prove that the unlawful act which caused the victim's death was dangerous, the prosecution may rely on s 4A to assist in proving this element of the offence. Section 4A(3) provides that it is irrelevant that the single punch or strike is one of a series of punches or strikes. In situations where there are numerous punches or strikes, the prosecution may rely on s 4A(2) if it can identify a single punch or strike as the dangerous act that caused the victim's death. If it cannot, the common law test of dangerousness will be used to determine whether the act that caused the victim's death was dangerous. That test is whether a reasonable person in the position of the accused

---

<sup>1026</sup> Queensland Law Reform Commission above n 1,207. Western Australian Law Reform Commission, above n 260, 91.

<sup>1027</sup> Explanatory Memorandum, Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014 (Vic), 19 August 2014.

would have realised that the conduct would expose the victim to an appreciable risk of serious injury.<sup>1028</sup> This provision essentially retains the excuse of ‘accident’ in contrast to the other States who have removed the excuse from their ‘one punch’ legislation.

#### **a) Removal of judge’s discretion?**

Then Victorian Premier Denis Naphthine said the laws were designed to deter people from committing the ‘unspeakable acts of cowardice’.<sup>1029</sup> However, the Victorian Criminal Bar Association (CBA) opposed the laws, which it claimed removed too much of the judges’ discretion and would undermine the public’s faith in the courts and justice system.<sup>1030</sup> CBA chairman, Mr Peter Morrissey QC, highlighted that every case had different circumstances which had to be considered in sentencing. Interestingly, in February 2014 the then Victorian Labor Opposition promised to introduce a new offence if it won office, of causing death by assault that would attract a maximum 20 year gaol term.<sup>1031</sup> The Victorian Government earlier legislated against perceived increased street violence with its *Crimes Amendment (Gross Violence Offences) Act* 2013.<sup>1032</sup> The amendment created two new offences:

- (i) Causing serious injury intentionally in circumstances of gross violence
- (ii) Causing serious injury recklessly in circumstances of gross violence.

The new offences attract a statutory minimum sentence of four years’ imprisonment without parole for adult offenders and a maximum of 20 years imprisonment. The offences also apply to offenders under 18 years of age; however, those offenders are not be subject to the statutory minimum penalty.

The then Attorney-General, Robert Clark, told the House during the Second reading of the Bill that the government was responding to an election commitment.<sup>1033</sup> He said, for too long the law had not done enough to protect innocent Victorians from becoming

---

<sup>1028</sup> *Wilson v The Queen* (1992) 174 CLR 313.

<sup>1029</sup> AAP, ‘New laws target ‘coward punch’ killers’, *The Age*, (Melbourne) 17 August 2014, <http://www.theage.com.au/victoria/new-laws-target-coward-punch-killers-20140817-10525m.html>

<sup>1030</sup> Richard Willingham, ‘Lawyers condemn coward punch laws’, *The Age*, (Melbourne) 18 August 2014, <http://www.theage.com.au/victoria/lawyers-condemn-coward-punch-laws-20140817-10527m.html>

<sup>1031</sup> AAP, ‘New laws target ‘coward punch’ killers’, *The Age*, (Melbourne) 17 August 2014, <http://www.theage.com.au/victoria/new-laws-target-coward-punch-killers-20140817-10525m.html>

<sup>1032</sup> Dan Oakes, ‘One Punch Can Kill’, *Sydney Morning Herald*, (Sydney) January 2, 2013. The article refers to a roll call of young men killed in Victoria since 2007 as the result of unprovoked attacks.

<sup>1033</sup> Victoria, *Crimes Amendment (Gross Violence Offences) Bill 2012 (Vic)*, 13 December 2012, 5549 (Attorney-General, Robert Clark).

victims of horrific, unprovoked attacks that leave lifelong injuries.<sup>1034</sup> Furthermore, he said, by putting violent offenders behind bars for longer it would send a clear and strong deterrent to would-be offenders.<sup>1035</sup> The new offences gave effect to reforms to the definitions of injury and serious injury, not only for the new gross violence offences, but also for all other relevant offences under the *Crimes Act 1958*.

#### **b) Mandatory sentences attract criticism**

What effect these proposed new laws have had on ‘one punch’ killers in the brief time since they were enacted is uncertain, but it seems they were intended to capture a subset of the serious injury offences cases, namely those that involve a particularly high level of harm and culpability.

The new laws attracted the same sort of criticism as the most recent legislation, mainly because of the mandatory sentencing requirement. For instance, the Victorian Sentencing Advisory Council (SAC) who were asked to advise on the *Crimes Amendment (Gross Violence Offences) Bill 2013*, claimed that the mandatory minimum sentences would not necessarily reduce crime rates.<sup>1036</sup> SAC chairman, Arie Freiberg, said evidence indicated plea bargaining would probably increase once mandatory minimums were in place, which could also lead to more not guilty pleas.<sup>1037</sup> The Law Institute of Victoria, in its submission to the SAC, criticised mandatory sentences, because they lead to ‘harsh and unjust outcomes where the judicial officer cannot take into account the individual circumstances of the offender or the offence, to mitigate the penalty below the mandatory minimum’.<sup>1038</sup> Only time will tell how effective or otherwise the new laws will be on street violence, but they are certainly evidence that governments, world-wide, are eager to be viewed as responding with tough legislation to a perceived problem that seemingly troubles the community.

---

<sup>1034</sup> Ibid.

<sup>1035</sup> Ibid 5554.

<sup>1036</sup> Melissa Jenkins, ‘Gross violence laws ‘won’t cut crime’, *The Sydney Morning Herald*, (Sydney) Nov. 10, 2011, <http://www.smh.com.au/breaking-news-national/gross-violence-laws-wont-cut-crime-20111110-1n7rh.html>

<sup>1037</sup> Ibid.

<sup>1038</sup> Law Institute of Victoria, Submission No. 11 to Sentencing Advisory Council (Vic), ‘Statutory Minimum Sentences for Gross Violence’, 01 July 2011, 3.

### 8.2.6 *A Lack of Comity in Australian States/Territories*

Although five of the Australian legislatures have provided new legislation for people accused of ‘one punch’ homicides, Tasmania has not seen the need to change its legislation nor has South Australia, the Australian Capital Territory and the Commonwealth, all of whom presumably experience the same sort of violence as the other States. This could prove to be problematical, as it points to a lack of comity and ignores the fundamental aim of trying to make the criminal law as uniform and as understandable as possible so that citizens can easily ascertain what they can and cannot do.<sup>1039</sup>

Of even greater concern are the anomalies that arise from the different forms of legislation that the four Code States have introduced. For a start, all the statutes have different names. In Western Australia it is: unlawful assault causing death, in New South Wales: assault causing death, in the Northern Territory: violent Act causing death and in Queensland: unlawful striking causing death.<sup>1040</sup> In Queensland the maximum sentence for the offence is life imprisonment,<sup>1041</sup> in New South Wales, 20 years,<sup>1042</sup> in the Northern Territory, 16 years,<sup>1043</sup> and in Western Australia, 10 years.<sup>1044</sup> The maximum penalty in New South Wales rises to 25 years if the offender commits the offence while intoxicated.<sup>1045</sup>

There are numerous other differences between the various legislatures that address basically the same offence, which are not necessary to outline. Suffice to say, it does give the impression that the laws were hastily drafted without much consideration of drawing together common sense, understandable legislation.

---

<sup>1039</sup> Joshua Dressler, Frank R Strong and Michael E Moritz, *Understanding Criminal Law*, (LexisNexis 6<sup>th</sup> ed, 2012)

<sup>1040</sup> Unlawful assault causing death *Criminal Code 1913* (WA) s 281; Unlawful assault causing death *Criminal Code 1983* (NT) s 161A; Assault causing death *Amendment of Crimes Act 1900* (NSW) s 25A; Unlawful striking causing death *Criminal Code 1899* (Qld) s 302A.

<sup>1041</sup> *Criminal Code 1899* (Qld) s 302A (1).

<sup>1042</sup> *Amendment of Crimes Act 1900* (NSW) s 25A (1).

<sup>1043</sup> *Criminal Code 1983* (NT) s 161A.

<sup>1044</sup> *Criminal Code 1913* (WA) s 281(1).

<sup>1045</sup> *Amendment of Crimes Act 1900* (NSW) s 25A (2)

### 8.2.7 *Ireland - Assault causing death*

It is interesting to note that The Law Reform Commission of Ireland (LRCI), in its final report published on 29 January 2008, reviewed the law of homicide and considered the introduction of a similar offence, as enacted in Western Australia, the Northern Territory and New South Wales.<sup>1046</sup> Ireland is one of the few countries where a Law Reform Commission has specifically referred to the problem of ‘one punch’ killings and because of Australia’s Irish heritage is of particular significance.<sup>1047</sup> The LRCI was of the opinion that the most problematic aspect of unlawful and dangerous act manslaughter, is that it punishes very harshly people who deliberately commit minor assaults and thereby unforeseeably cause death. It thought minor acts of deliberate violence (such as the ‘shove in the supermarket queue’ referred to in Chapter Five), should be removed from the scope of unlawful and dangerous act manslaughter, because where deliberate wrongdoing is concerned, they are truly at the low end of the scale. The Commission points out that in many ‘single punch’ type cases there would be no prosecution for assault had a fatality not occurred.<sup>1048</sup>

The Commission did, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct, and should, therefore, be marked accordingly. They noted it might well be traumatic for the families of victims who died as a result of deliberate assaults, albeit those which were minor in nature, if the perpetrator of the assault were only charged with, convicted of, and sentenced for, assault, rather than the more serious sounding offence of manslaughter. Thus, the Commission believed it would be more appropriate to enact a new offence such as an ‘assault causing death’ which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of the death in the offence label.<sup>1049</sup> This is not dissimilar to the road traffic offence of ‘dangerous driving causing death’. The Commission believed the offence should only be prosecuted on indictment and have a higher sentencing maximum than for assault *simpliciter*, although it did not recommend

---

<sup>1046</sup> Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, (Report 87, 2008) 97.

<sup>1047</sup> John O’Brien & Pauric Travers, *The Irish Emigrant Experience in Australia* (Dufour Editions, 1991).

<sup>1048</sup> *Ibid* 5.03-5.36.

<sup>1049</sup> *Ibid* 5.39 – 5.43.

what the maximum should be.<sup>1050</sup> Another suggestion was that the term ‘assault manslaughter’ would be a more attractive name for this offence than ‘assault causing death’ or ‘causing death by assault’, because the term ‘manslaughter’ better reflects the seriousness of the offence.<sup>1051</sup>

#### **a) Assault causing death definition**

The LRCI recommended the following definition of ‘assault causing death’:

Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances.<sup>1052</sup>

Obviously, the LRCI was considering this issue in the context of the criminal law of Ireland and manslaughter by unlawful and dangerous act, which has a different fault element from that which applies in the Australian Code law States who do not require that the act be unlawful or dangerous. However, their focus was the same as considered in Queensland, Western Australia and the Northern Territory that those who kill ‘accidentally’ are justly punished in a way that appropriately marks the severity of the consequences of their actions. That is, the occurrence of death does not increase the culpability of the accused, but a fatality does give a much more serious dimension to the offence because consequences matter.

Interestingly, the LRCI did not recommend that the offence of ‘assault causing death’ be a statutory alternative to manslaughter or murder, but that a choice be made by the relevant prosecuting authorities.<sup>1053</sup> It was their view that it would make more sense to treat this offence as a distinct new homicide offence. Although, it must be pointed out, that while there was considerable agreement by consultees to the LRCI report’s recommendation for ‘assault causing death’ rather than manslaughter, many were opposed to giving judges the discretion to take the fact of death into account when sentencing.<sup>1054</sup> It was submitted that it would not be fair to hold someone accountable for a consequence that they could not have reasonably foreseen in circumstances where it is accepted that the act is at the bottom end of the scale of culpability. This concession

---

<sup>1050</sup> Ibid 5.41

<sup>1051</sup> Ibid 5.28.

<sup>1052</sup> Ibid 5.46.

<sup>1053</sup> Ibid.

<sup>1054</sup> Ibid 5.19.



is really an admission that the new offence does not address the moral link between an assault on a victim and the victim's death.

Nevertheless, the advantage of having a broad homicide offence such as this is that it would not be restricted to deliberate assaults or other violent conduct, but could also apply to cases of fatal neglect. As the LRCI points out, rather than merely prosecuting someone for assault or for neglect where the fatal consequences are ignored in the label, such an offence would be a specific homicide offence and the fact of death, would therefore, be recognised and marked.<sup>1055</sup>

In order to establish 'assault causing death' the prosecution would, of course, have to establish the ordinary mental elements concerning assault. Furthermore, it would have to establish that death was a wholly unforeseeable consequence of the accused's assault. If a reasonable person would think that death was a likely consequence of the assault, then manslaughter should be charged and not a lesser offence.

#### **b) Draft Homicide Bill**

The *Draft Homicide Bill* 2008 as drawn up by the LRCI concerning 'assault causing death' is as follows:

##### *Assault causing death*

5. (1) A person commits the offence of assault causing death if:
- (a) the accused person commits an assault which causes death, and
  - (b) a reasonable person would not have foreseen that death or serious injury was, in the circumstances, likely to result.
- (2) Prosecutions for the offence of assault causing death shall be on indictment.

Mitchell has written that although the LRCI's recommendation is a step in the right direction, it is 'unnecessarily and unjustifiably narrow'.<sup>1056</sup> He argues that if the prevailing wisdom is that it is right to convict the 'one punch' killer of some sort of homicide offence (rather than just the common assault which a single punch would

---

<sup>1055</sup> Ibid 5.12.

<sup>1056</sup> Barry Mitchell, 'Although the Ministry of Justice has spent the last two years reviewing homicide law, there still remains a serious problem around "one-punch killers" which means punishment for bad luck', *The Barrister Magazine* (online), 30 July, 2010 (Trinity Term issue).  
<http://www.barristermagazine.com/barrister/index.php?id=30>

normally constitute), then it should be of committing ‘an unlawful and dangerous act causing death’.<sup>1057</sup> The adjective ‘dangerous’ would mean that the defendant’s act created a risk of causing serious, though not necessarily fatal, injury. Conviction, in this instance, would depend on the defendant being aware of the risk when throwing the punch. According to Mitchell, the gap between what was foreseen, and the harm for which the defendant is held criminally liable, would be much less than the law currently allows.<sup>1058</sup>

It is worth noting that so far the LRCI’s recommendations and the suggestions by Mitchell, have not been implemented. This lack of interest by the authorities might be seen as indication that introducing an offence that is seen as favouring the defence rather than the prosecution, is not as attractive to the public as a reform that increases the level of punitiveness. This was acknowledged by comments from Lord Taylor CJ in *Pettipher* where he said that, ‘notwithstanding the relatively low level of an offender’s *mens rea*, the public would want the courts to increase the sentence so as to reflect the loss of a life’.<sup>1059</sup>

### 8.3 Duty of Persons in Charge of Dangerous Things

Another alternative charge which has been suggested in Queensland, is employing s 289 of the Queensland Criminal Code ‘Duty of Persons in charge of dangerous things’, which states:

It is the duty of every person who has in the person’s charge or under the person’s control anything, whether living or inanimate, and whether moving or stationary, of such a nature that in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.<sup>1060</sup>

---

<sup>1057</sup> Ibid.

<sup>1058</sup> Ibid.

<sup>1059</sup> *Pettipher* [1989] 11 Cr App R (S) 321.

<sup>1060</sup> James J Edelman, ‘Preventing Intentional “Accidents”: Manslaughter, Criminal Negligence and Section 23 of the Criminal Codes’ (1998) 22(2) *Criminal Law Journal*, 71, 76.

The section imposes a duty on any person who has charge or control of anything of such a nature, that in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care or reasonable precautions to avoid such danger. The person under the duty is then held to have caused any consequences to the life or health of others by a failure to perform the duty. This provision operates to facilitate proof of guilt in circumstances where death or injury has occurred following criminal negligence. So in order to establish criminal responsibility for causing a death under s 289, the Crown must prove that an accused was guilty of that degree of negligence which is punishable as manslaughter under the common law.<sup>1061</sup> It is arguable a fist may be considered a dangerous thing as it has the same potential for harm, if used in a dangerous manner, as certain types of weapon or other things that are not inherently dangerous unless used in a dangerous manner.<sup>1062</sup> Surprisingly, there is little authority on this point.

The first reported case in Queensland is the decision of the Court of Criminal Appeal of Queensland in *Dabelstein* in 1966.<sup>1063</sup> The accused appealed against his conviction of manslaughter. The evidence established that the accused's mistress had suffered a fatal haemorrhage after he had thrust a sharpened pencil into her vagina and ruptured the vaginal wall. The majority dismissed the appeal holding that a conviction was inevitable on the admitted facts. Wanstall J expressly held that s 289 was applicable as:

The section is not, in my view, concerned only with the objective nature of the thing in question – with its designed characteristics or functions – but also with the practical consequences of its being used or managed carelessly. A knitting needle is an inherently harmless object by design, but a harmful one when thrust into someone's body, and so is a sharpened pencil, and when so used neither is distinguishable from a dagger.<sup>1064</sup>

The dissenting judge, Hanger J, was equally emphatic that a sharpened pencil was not a dangerous thing. He said:

In my opinion, the pencil was nothing of the kind. The section is designed, in my opinion, to deal with anything living or inanimate, which is innately dangerous; it is not

---

<sup>1061</sup> *Callaghan v The Queen* (1952) 87 CLR 115; *R v Scarth* [1945] St R Qd 38.

<sup>1062</sup> As in *Taiters* [1997] 1 Qd R 333. But compare *Jackson & Hodgetts* (1989) 44 A Crim R 320, 325 (per Thomas J).

<sup>1063</sup> *Dabelstein* [1966] Qd R 411.

<sup>1064</sup> *Ibid* 429.

designed to deal with things which are normally harmless, and only become harmful in certain circumstances.<sup>1065</sup>

The narrow view of Hanger J was referred to and followed in a few subsequent cases, but there is one more recent authority which, at least implicitly, favours the wider construction.<sup>1066 1067</sup> This wider view would arguably support the contention that while the human hand is inherently a harmless object, it becomes a harmful one when doubled into a fist and thrust into vulnerable areas of the human body. However, because one of the elements of the s 289 offence is negligence, the excuse of a lack of foreseeability appears to be excluded.

That is clear from the opening lines of s 23(1) which state: 'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for...' It is thought the word 'express' in s 23 is used as the antonym of 'implied'.<sup>1068</sup> That is, the Code makes s 23 subject to other provisions of the Code, and describes these other provisions as 'express provisions.... relating to negligent acts and omissions'.<sup>1069</sup> The word 'express' must be regarded as qualifying not just the word 'provisions', but the whole of the phrase which follows it. In other words, the section must be understood to mean: Subject to the provisions of the Code expressly relating to acts and omissions.<sup>1070</sup>

In *R v Hodgetts and Jackson*,<sup>1071</sup> the majority held that s 23 had no application to a s 289 charge because criminal negligence was the essence of the offence alleged. The majority held, that in cases falling under s 289, a separate set of sections and considerations applied from those which applied to other cases involving death or harm through personal violence. In arriving at this decision the majority followed *Callaghan*

---

<sup>1065</sup> Ibid 416.

<sup>1066</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47; *McCallum* [1969] Tas SR 73; *Kalit* [1971-72] P&NGLR 124.

<sup>1067</sup> *R v Hodgetts and Jackson* [1990] 1 Qd R 456.

<sup>1068</sup> *R v Young* [1969] Qd R 417, 425. (Hanger J).

<sup>1069</sup> Ibid.

<sup>1070</sup> Ibid.

<sup>1071</sup> *R v Hodgetts and Jackson* [1990] 1 Qd R 456.

*v R*,<sup>1072</sup> and *Evgeniou v R*.<sup>1073</sup> They cited from *Callaghan* to the effect that because s 23 was qualified by being made subject to the provisions relating to negligent acts and omissions, and s 289 was such a provision, it must be taken, that the fact that an event causing death occurred independently of the accused's will or by accident, could offer no excuse. The view also seems to be that s 289 cannot be pleaded as an 'alternative' to a Crown case based on 'intention to do harm' arising from circumstances that do not amount to murder.<sup>1074</sup>

In the only High Court case in which this issue directly arose, a joint judgment of the majority of the court was based on the assumption that s 289 could be an alternative charge.<sup>1075</sup> The case involved the discovery of the body of a 16-year-old boy with a bullet hole in the back of his skull. The body was discovered in Queensland's Glasshouse Mountains area not far from the deceased's home. The appellant was the deceased's best friend. The appellant did not give evidence at the trial, and the case against him rested heavily upon culpable statements he had made to two girls with whom he had been friendly. To one, he said that he knew 'whose body is up in the mountains'. To the other, he said that he had 'shot or killed' the deceased and that 'it was an accident'. The jury convicted him of manslaughter. The Crown case was based on s 289 and at trial, the judge's directions excluded the operation of s 23. The High Court held that the direction to the jury had been incorrect, and the verdict should be set aside, the conviction quashed and a verdict of acquittal entered. Brennan, Dawson and Gaudron JJ did so on the basis that s 23 had not been put to the jury, despite acknowledging that the express provisions of the Code relating to negligent acts and omissions included s 289.

The reason that s 23 was said to apply was that the crime for the breach of s 289 is manslaughter and, as it can also arise in circumstances not amounting to murder, the alternative bases for conviction of manslaughter were issues for the jury.<sup>1076</sup> As the second basis for manslaughter required satisfaction by the Crown that s 23 did not

---

<sup>1072</sup> *Callaghan v The Queen* (1952) 87 CLR 115.

<sup>1073</sup> *Evgeniou v The Queen* [1965] ALR 209.

<sup>1074</sup> *Jackson & Hodgetts* (1989) 44 A Crim R 320, 326; *R v Young* [1969] Qd R 417.

<sup>1075</sup> *Griffiths v The Queen* [1994] 69 ALJR 77.

<sup>1076</sup> *Griffiths v The Queen* [1994] 69 ALJR 77, 79.

apply, a direction should have been given as to s 23. Edelman has commented this argument is somewhat artificial because the only charge that the Crown specified in the indictment was s 289.<sup>1077</sup> “It would seem strange”, he said, ‘for a jury to be directed to s 23, but told they were to disregard that direction in considering the specifics of the Crown’s argument’.<sup>1078</sup> Nevertheless, what is clear from the judgment, is that acts which may be intentional could be charged in either manner.

The alternative judgments of Deane and Toohey JJ took a different tack. Their Honours agreed that the direction to the jury was inadequate, but held that this was because the jury had not been adequately directed in relation to s 289.<sup>1079</sup> They did not consider whether or not a s 23 direction was necessary, where the Crown posed an alternative argument of voluntary manslaughter and manslaughter based on criminal negligence. As Edelman has pointed out, this case confirms two points.<sup>1080</sup> First, that s 289 can be pleaded in the alternative to an argument based on voluntary manslaughter. Secondly, that although in such a case s 23 should be directed on in relation to the latter aspect, a trial judge could specify that it is excluded from manslaughter based on s 289.

Of course, the decision to charge is at the discretion of the DPP in Queensland, and although they appear to have shown a reluctance to prefer s 289 in cases of voluntary manslaughter, it is an alternative that ought to be reconsidered. Not least because there may be advantages in avoiding complex foreseeability arguments which sometimes result in acquittals, but ‘breach of a duty to take care of dangerous things’ directions may be more comprehensible to juries.

## **8.4 Killing by Gross Carelessness**

Another alternative to manslaughter is a proposed offence known as ‘killing by gross carelessness’. This offence was recommended by the England and Wales Law Commission in its 1996 report ‘Legislating the Criminal Code: Involuntary

---

<sup>1077</sup> James J Edelman, ‘Preventing Intentional “Accidents”: Manslaughter, Criminal Negligence and Section 23 of the Criminal Codes’ (1998) 22(2) *Criminal Law Journal* 71, 76.

<sup>1078</sup> Ibid.

<sup>1079</sup> *Griffiths v The Queen* [1994] 69 ALJR 77, 82.

<sup>1080</sup> Edelman, above n 1023, 76.

Manslaughter'.<sup>1081</sup> The recommended offence was broadly based on the principle that, while many people make errors of judgment, a serious homicide offence should target only those who are very seriously at fault.<sup>1082</sup> The provisional proposal was in the following terms:

- (1) The accused ought reasonably to have been aware of a significant risk that his or her conduct could result in death or serious injury; and
- (2) His or her conduct fell seriously and significantly below what could reasonably have been demanded of them in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.

Following consultation, the Law Commission decided it was an important element of the new offence that the risk of death or serious injury would have been *obvious* to a reasonable person in the accused's position.<sup>1083</sup> 'Obvious' in this context means 'immediately apparent', 'striking' or 'glaring'. The Commission was of the view that a person cannot be blamed for failing to notice a risk if it would not have been obvious to a reasonable person in his or her place.<sup>1084</sup> The Commission chose the word 'obvious' rather than 'foreseeable', because it thought that the former is more generous to the defendant and thus closer to the concept of culpable inadvertence.<sup>1085</sup> Also, it was felt, it was a word which juries would readily understand. There is some merit in this proposal. Of course it would be a question of fact for the jury in every case, whether the risk that the defendant's conduct would cause death or serious injury would have been obvious to a reasonable person in his or her position.

The Commission also said when considering this element, it must attribute to 'the reasonable person', any relevant facts within the knowledge of the accused at the time in question.<sup>1086</sup> They gave as an example where an accused broke into the house of an elderly person, and it is proved that he or she knew that the victim had a weak heart, this knowledge would be attributed to the reasonable person and the jury may decide that it

---

<sup>1081</sup> The England & Wales Law Commission, above n 41, 47.

<sup>1082</sup> *Ibid* 5.44.

<sup>1083</sup> Involuntary Homicide Bill (1999) cl 2 (1)(a).

<sup>1084</sup> The England & Wales Law Commission, above n 41, 5.27.

<sup>1085</sup> *Ibid*.

<sup>1086</sup> *Ibid* 5.28.

would have been obvious to such a person that the defendant's conduct carried a risk of causing death or serious injury to the victim.<sup>1087</sup>

In fact, even no knowledge of the victim's congenital weakness can lead to a conviction for negligent manslaughter. In the English case of *Watson*, the defendant and another broke into the home of a man who was, unknown to them, aged 87 and suffering from a serious heart condition.<sup>1088</sup> The householder confronted them. The defendants verbally abused him and then left empty-handed. The householder died 90 minutes later. *Watson* was convicted on the basis that the whole incident of the burglary constituted the unnecessary unlawful act, and the burglary had caused the death.

The other element of killing by gross carelessness is that the accused must have been capable of appreciating the risk at the material time.<sup>1089</sup> Since the fault of the accused lies in a failure to consider the risk, then the accused should not be punished for this failure if the risk in question was not apparent to him or her. Finally, it must be proved either (i) that the accused's conduct fell far below what could reasonably be expected of him or her in the circumstances, or (ii) that he or she intended by their conduct to cause some injury or was aware of, and unreasonably took, the risk that it might do so.<sup>1090</sup>

The Commission reasoned that this element of the new offence was intended to catch only the very worst cases in which a person inadvertently causes death, as is appropriate for a serious homicide offence.<sup>1091</sup> So how would this proposed offence apply in the case of our 'one punch' killer? It would appear that the jury would have to decide whether it would have been obvious to a reasonable person in the defendant's position that punching the victim as hard as they did, would create a risk of causing death or serious injury, and whether the defendant was capable of appreciating the risk at the time in question. If the answer to both of these questions is 'yes', and if it is satisfied that the defendant intended to cause some injury to the victim, or was reckless as to doing so, the jury must convict. If not, the accused may be convicted of the appropriate

---

<sup>1087</sup> *Ibid.*

<sup>1088</sup> *Watson* [1989] 1 WLR 684.

<sup>1089</sup> Involuntary Homicide Bill 1999 (UK) cl 2 (1) (b).

<sup>1090</sup> The England & Wales Law Commission, above n 41, 5.31.

<sup>1091</sup> *Ibid.*



non-fatal offence in the alternative, such as assault occasioning bodily harm with death as an aggravating circumstance.

## 8.5 Gross Negligence Manslaughter

In 2006 the Law Commission brought down its report on ‘Murder, Manslaughter and Infanticide’, in which it recommended that the ‘two category’ structure of general homicide offences be abolished.<sup>1092</sup> The Commission was of the view that the more than 500 years old distinction between murder and manslaughter was due for change, to accommodate fluctuating and deepening understandings of the nature and degree of criminal fault, and the emergence of new partial defences.<sup>1093</sup> Consequently, they proposed replacing the two-tier structure with a three tier structure. That is, first degree murder, second degree murder and manslaughter.

Under the Law Commission’s recommendations, first degree murder would encompass:

- (1) Intentional killing; or
- (2) Killing through an intention to do serious injury with an awareness of a serious risk of causing death.

Second degree murder would encompass:

- (1) Killing through an intention to do serious injury (even without an awareness of a serious risk of causing death); or
- (2) Killing where there was an awareness of a serious risk of causing death, coupled with an intention to cause either:
  - (a) Some injury;
  - (b) A fear of injury ;or
  - (c) A risk of injury.

Manslaughter would encompass:

- (1) Where death was caused by a criminal act intended to cause injury, or where the offender was aware that the criminal act involved a serious risk of causing injury; or
- (2) Where there was gross negligence as to causing death.<sup>1094</sup>

---

<sup>1092</sup> The England and Wales Law Commission ‘Murder, Manslaughter and Infanticide’: Project 6 of the Ninth Programme of Law Reform: Homicide’, (Consultation Paper No 304, 28 November 2006) 9.

<sup>1093</sup> Ibid 9.

<sup>1094</sup> Ibid 10.

For a person charged with a ‘one punch’ fatality, not much would seem to change with these recommendations. Manslaughter would seem to be the appropriate charge, as it is now, and in more egregious circumstances perhaps second degree murder, provided the prosecution could prove the defendant had an awareness of a serious risk of causing death, coupled with an intention to cause some injury.

The Commission did not appear to revisit its 1996 recommendation concerning killing by gross carelessness, however it did consider that ‘reckless killing’ would fall into second degree murder, and reckless manslaughter should be subsumed into gross negligence manslaughter.<sup>1095</sup> They recommended the adoption of the definition of causing death by gross negligence given in their earlier report on manslaughter which states:

- (1) A person by his or her conduct causes the death of another;
- (2) A risk that his or her conduct will cause death would be obvious to a reasonable person in his or her position;
- (3) He or she is capable of appreciating that risk at the material time; and
- (4) His or her conduct falls far below what can reasonably be expected of him or her in the circumstances.<sup>1096</sup>

Gross negligence can be committed, even where the defendant was unaware that his or her conduct might cause death, or even injury. This is because negligence does not necessarily involve any actual realisation that one is posing a risk of harm; it is a question of how obvious the risk would have been to a reasonable person. Under these circumstances, it would seem gross negligence would not be the appropriate charge for a ‘one punch’ killer, as the defendant, by his or her very actions, would be aware that their conduct might cause injury if not death. It has also been argued that penal consequences concerning negligence are pointless, as the thoughtless and the careless cannot be deterred, whereas reckless or intentional criminality can be influenced by the prospect of harsh treatment.<sup>1097</sup>

---

<sup>1095</sup> Ibid 63.

<sup>1096</sup> England and Wales Law Commission, ‘Involuntary Manslaughter’ (Report No 237, 1996) 5.34.

<sup>1097</sup> Andrew P Simester, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, (Hart Publishing, 4<sup>th</sup> ed. 2010) 413.

## 8.6 The Abolition of the Excuse of a Lack of Foreseeability

In his article, ‘Is The Criminal Law a Lost Cause?’, Andrew Ashworth bemoaned the growth in the number of offences in English criminal law.<sup>1098</sup> He observed that there was little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, and little sense that making conduct criminal was a step of considerable social significance. It was what he described as this ‘unprincipled and chaotic construction of the criminal law that prompted the question whether it was a lost cause’.<sup>1099</sup> In another context, when writing about yet another proposal to increase police powers, New South Wales Public Defender, Mr Andrew Haesler SC, said he was an advocate for what he described as the ‘broccoli principle’ of law reform: ‘You can’t have any new powers until you use up the ones you’ve got!’<sup>1100</sup> The same could be said about creating new offences.

## 8.7 Statutory Alternatives

Many would agree that the creation of new offences without compelling reasons is unnecessary, but there is another alternative and that is to introduce statutory alternatives. That is, the offence of assault occasioning death could be available on a charge of manslaughter as a statutory alternative to it, where assault is a factual element of a charge for murder or manslaughter. Assault Occasioning Bodily Harm under the Queensland Criminal Code,<sup>1101</sup> attracts a maximum penalty of seven years imprisonment, the same as recommended by the unsuccessful McArdle Bill referred to above.

The suggestion is not entirely novel, as it was applied in a United Kingdom case in the 1980’s. In *McNamara*, sentences of seven years imposed for manslaughter were

---

<sup>1098</sup> Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 (2) *Law Quarterly Review*, 225.

<sup>1099</sup> *Ibid.*

<sup>1100</sup> Andrew Haesler SC, ‘Police Powers 2006: The Law Enforcement (Powers and Responsibilities) Act (2002)’, (Paper presented at NSW Public Defenders Professional development course, Sydney, 17 March 2007).

<sup>1101</sup> *Criminal Code 1899 (Qld)* s 339 Assaults occasioning bodily harm. *Criminal Code 1899 (Qld)* s 339 (1) Any person who unlawfully assaults another and thereby does him bodily harm is guilty of a crime, and is liable to imprisonment for seven years.

reduced to four years.<sup>1102</sup> In that case, the injury which caused the death was inflicted by a blow from a fist. The Court interpreted the verdict to mean that the defendants did not intend grievous bodily harm, and therefore the sentence for manslaughter should be below the maximum sentence for assault occasioning bodily harm, which was five years. Of particular interest was a passage from the judgment which reads as follows:

Doubtless many people feel that where death results from the commission of an offence, the punishment must be severe. Time and time again courts, including this one, when faced with the problem of deciding upon an appropriate sentence endeavour to disassociate the fact of the death from what the appellant or appellants did to bring it about.<sup>1103</sup>

However, *McNamara* was disapproved in later sentencing decisions where it was held not proper for the Court to treat a case where death results from an unlawful blow, simply on the basis of an assault.<sup>1104</sup>

Another matter to consider is that the automatic availability of extra verdicts would lengthen the Judge's charge to a jury, and may raise the spectre of 'compromise' verdicts, which are unwanted by both prosecution and defence. However, it would be a better alternative than creating a new offence of unlawful assault occasioning death, gross negligence manslaughter, or careless killing by negligence. This suggestion was rejected by the then Queensland DPP, who informed the QLRC that he was not in favour of making assault, assault occasioning bodily harm, or grievous bodily harm statutory alternatives to manslaughter. He was concerned that this would result in juries reaching compromise verdicts.<sup>1105</sup>

Nevertheless, the discretion to include alternative counts on the indictment is left to the DPP. The discretion allows for charges to meet the facts of the individual case, and discourages juries from comprising. While the Crown can be relied upon to act responsibly, as the Queensland DPP candidly noted, if new offences were introduced, it

---

<sup>1102</sup> *McNamara* [1984] 6 Cr App R (S) 356.

<sup>1103</sup> *Ibid.*

<sup>1104</sup> As per Lord Lane CJ in *Ruby* [1987] 9 Cr. App. R. (S.) 30. See *Tominey* [1986] 8 Cr App R (S) 161 where an argument by Counsel that the occurrence of death should not make a great difference (citing *McNamara*) was rejected.

<sup>1105</sup> Queensland Law Reform Commission, above n 1, 225.

would create the potential for the ‘manipulation’ of charges by the Crown.<sup>1106</sup> For example, if the defence seemed likely to rely on provocation, the Crown can charge manslaughter; if the defence seems likely to rely on accident, they may charge assault causing death.<sup>1107</sup> Therefore, it seems sensible that any proposed change to the law that might make it more vulnerable to manipulation should be avoided.

## 8.8 Abolish Foreseeability Altogether?

It might be, that the final option is to do away altogether with the excuse of ‘a lack of foreseeability’. This was certainly the opinion of some submissions to the QLRC when they were reviewing the then excuse of accident.<sup>1108</sup> The abolition of the foreseeability excuse would mean a person could be held responsible for the consequences of their actions, regardless of whether they were lawful or if they were unforeseen. But, as noted in Chapter One, this position is at odds with civil law, where a person cannot be held responsible for something that is not foreseeable. It would also return the law to medieval times, whereby the effect of accident in homicide was a matter of history, and not of logic. In early times, if A caused the death of B, by pure accident or involuntarily in self-defence, he was nevertheless guilty and became liable to forfeiture of his goods. Pardon was his only means of escaping punishment.<sup>1109</sup> This meant the undesirable imposition of a criminal sanction without moral fault.

In its Audit on Defences to Homicide, the Queensland Department of Justice and Attorney-General posed the question: ‘Is the excuse provided by s23(1)(b) of the *Criminal Code* (Qld) appropriate in a case when death results?’<sup>1110</sup> The question was answered in the positive by the QLRC in its final report of its review into the then excuse of accident and the defence of provocation, where it recommended s 23(1)(b)

---

<sup>1106</sup> Ibid, 176.

<sup>1107</sup> Ibid 213.

<sup>1108</sup> Ibid 148.

<sup>1109</sup> See R E Ross, *Russell on Crime*, (Stevens & Sons, 9<sup>th</sup> ed. 1936) Vol 1, 504.

<sup>1110</sup> Department of Justice and Attorney-General, ‘Discussion paper Audit on Defences to Homicide: Accident and Provocation’, (Discussion paper, October 2007), 45.

should continue to excuse a person from criminal responsibility for an event that occurs by accident.<sup>1111</sup>

This accorded with the majority of submissions to the Commission, with only three members of the public supporting the removal of what was then known as the excuse of accident.<sup>1112</sup> It has to be emphasised that the Commission only received 18 submissions in total (most of them from the profession), so not much weight can be put on these results. Nevertheless, it does suggest the reported widespread public opposition to the excuse may be more myth than fact. As the QLRC pointed out, because accident applied generally to criminal offences and did not simply apply to manslaughter or the loss of life generally, abolishing the excuse would have far-reaching consequences.<sup>1113</sup> Its effect would be to impose criminal responsibility, not just for manslaughter, but also for other offences, where a defendant might not currently be found to be criminally responsible for the particular offence; for example, in other bodily injury cases such as; unlawful wounding, grievous bodily harm and assault. As Kenny notes,<sup>1114</sup> it could also have application to certain property offences, for example, wilful damage to property.<sup>1115</sup>

Under those circumstances, the QLRC recommended the Code should continue to include an excuse of accident. As noted in Chapter One of this thesis, there is another alternative. In 1995, the then Queensland Labor government drafted major revisions to the *Criminal Code*, which included adding a 4<sup>th</sup> sub-section to s 23[s 50 as drafted] which read:

28        The result intended to be caused by an act is immaterial to the person's responsibility, unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, completely or partly, by the act.

---

<sup>1111</sup> Queensland Law Reform Commission, above n 1, 207.

<sup>1112</sup> Ibid 135.

<sup>1113</sup> Ibid 184.

<sup>1114</sup> R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworths 7<sup>th</sup> ed, 2008) 144.

<sup>1115</sup> In *Kissier* (1982) 7 A Crim R 171, the accused was charged with the wilful and unlawful destruction of a pane of glass and the Court of Criminal Appeal referred to the breaking of the glass as being the event in question.

This amendment would have the effect of eliminating ‘accident’ in cases of personal violence. As the government was voted out that year the revised Code was not implemented and has never been reprised, nor was it considered in the QLRC report.

## 8.9 Conclusion

In this chapter I have canvassed the alternative offences that can be charged in relation to ‘one punch’ killers, and discussed whether the excuse of unintentional and unforeseen consequences is still relevant for the different elements that arise from these alternative causes of action. What I have found, in essence, is that criminal lawyers generally argue that the law of manslaughter functions perfectly well as it is, and that there are already more than enough categories of killing offences. Their fear is, that more grades of homicide would only lead to greater confusion among juries, and court time would be wasted in legal argument regarding the parameters of each offence. Furthermore, the difficulties can be addressed at the sentencing stage, where the trial judge takes different levels of culpability into account when determining sentence.

Another concern raised in this chapter is the lack of comity between Australian States and Territories in providing new legislation for people accused of ‘one punch’ homicides with three out of eight jurisdictions opting not to introduce new laws to deal with the so-called problem. There is also a lack of comity in the laws between the jurisdictions that have enacted the alternative offences particularly, as noted above, in regard to sentencing. In Western Australia, for example, the maximum penalty for a person convicted under s 281 Unlawful assault causing death *Criminal Code 1913*(WA) is 10 years imprisonment; in the Northern Territory s161A Violent act causing death *Criminal Code 1983* (NT) it is 16 years; New South Wales Assault causing death s 25A *Crimes Act 1900*(NSW) it is 20 years and 25 years with a minimum of eight years if the offender is deemed to be intoxicated; and in Queensland s 302A Unlawful striking causing death *Criminal Code 1899* (Qld) it is 15 years with the offender required to serve 80 per cent of their sentence imprisonment, before being able to apply for parole. When one considers that murder in most jurisdictions attracts sentences of life imprisonment of between 20-25 years it begs the question; why unintentionally killing a person with one punch (which is usually the case in alcohol-fuelled street violence) is

considered almost as heinous as a cold-blooded killing? Furthermore, the maximum penalty for manslaughter in NSW is 25 years and, unlike the offence of Assault causing death there is no standard non-parole period. These developments may lead to the perception that the laws are based on penal populism rather than a rational attempt to overcome an admittedly worrying problem.<sup>1116</sup>

Another thing the new laws have in common is that they all raise the spectre of mandatory sentencing which removes judicial discretion nor do they address what sentence will apply where the offender pleads guilty, comes from a disadvantaged background or has provided assistance to the authorities.<sup>1117</sup> Anecdotally, many lawyers are of the opinion that the imposition of mandatory severe sentences is a strong disincentive to early guilty pleas which provide substantial savings not only in costs but in reduced trauma for the victims. In any event, to date, there is no credible evidence that enacting tougher laws has so far reduced the street violence the legislation was created to prevent.

Nonetheless, as the QLRC has noted, labelling is a moral issue, and not a mere matter of administrative classification.<sup>1118</sup> Just because lawyers are comfortable with the current law relating to manslaughter, does not mean the law should remain unchanged. In the next chapter I will summarise the arguments for and against retaining the excuse of a lack of foreseeability as it relates to ‘one punch’ killers, and how, in a normative sense, the excuse ought to operate according to a valued system of justice.

---

<sup>1116</sup> See n 729.

<sup>1117</sup> *Bugmy v The Queen* [2013] HCA 37, 43-44.

<sup>1118</sup> Law Reform Commission, ‘Seminar Paper on Homicide: The Mental Element in Murder’, (Seminar paper LRC SP1-2001 21 March, 2001) 6.





## 9 A NORMATIVE APPROACH TO THE EXCUSE OF ‘ACCIDENT’

### 9.1 Introduction

In the last chapter, I discussed the suitability of alternative charges to deal with accused ‘one punch’ killers. It is now my intention to look at the philosophical aspects relating to what is commonly, but not always accurately, called the excuse of ‘accident’. The argument in my thesis has been to take a normative approach to the question of the relevance of the excuse of a lack of foresight, as it concerns those charged with fatalities caused through one-punch. My reasoning is essentially normative, rather than descriptive or historical, and at its core is the notion of fairness.

This thesis will use the concept ‘normative’ in the sense of describing the way the excuse of accident *ought* to operate according to a value position. As such, normative arguments can be conflicting, insofar as different values can be inconsistent with one another. For example, from one normative value position, the purpose of the criminal process may be to repress crime. From another value position, the purpose of the criminal justice system could be to protect individuals from the moral harm of a wrongful conviction.

The value position is a just and criminal law system that is more principled and conceptually more coherent. Furthermore, it involves the principle of certainty. Although this is a principle that, for a variety of reasons, cannot always be achieved, it is desirable to strive for, as anything that can make criminal law clearer, more consistent and more understandable would be a beneficial thing. Lacey describes it as the principle of legality, that is, criminal law must be announced clearly to citizens in advance of its imposition,<sup>1119</sup> as only those who know the law in advance can be seen as having a fair opportunity to conform to it. This is sometimes referred to as the principle of ‘fair warning’, that people should not be surprised to find out that they have committed a

---

<sup>1119</sup> Nicola Lacey, ‘Legal Constructions of Crime’ in Mike Maguire, Rod Morgan & Robert Reiner (eds) *The Oxford Handbook of Criminology* (Oxford University Press, 2007) 187.

criminal offence, and that they should have access to clear guidance on what is described as culpable wrongdoing.<sup>1120 1121</sup>

Furthermore, the law is not a disjointed ‘grab bag’ of unconnected instances, bearing no relationship to each other. Rather, it comprises a coherent and consistent whole. This has been recognised by the High Court of Australia which has, in recent years, been slowly formulating a doctrine of legal coherence to provide a framework for arranging legal jurisprudence; mainly, but not exclusively, in the field of negligence law.<sup>1122</sup>

## 9.2 Limits of Criminal Law

Underlying this normative framework, is a further set of assumptions about the nature of human conduct, for example, voluntariness, will, agency, capacity, as the basis for genuine human personhood and hence responsibility.<sup>1123</sup> Ashworth advocates a principled use of the criminal law by prescribing limits for the intervention of its coercive functions, particularly punishment of those persons who break the criminal law. This is the ‘principled core of the criminal law’, which contains four interlinked principles:

- The principle that the criminal law should be used, and only used, to censure persons for substantial wrongdoing;
- The principle that criminal laws should be enforced with respect for equal treatment and proportionality;
- The principle that persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences;
- The principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing.<sup>1124</sup>

---

<sup>1120</sup> Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2<sup>nd</sup> ed, 1985), 578-588; Ashworth, above n 532, 63-66.

<sup>1121</sup> John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, 1999) 210-212; J. Raz, *The Authority of Law: Essays on Law and Morality*, (Oxford University Press, 2<sup>nd</sup> ed, 2009), ch. 11.

<sup>1122</sup> Michael Gilhooly, ‘Legal Coherence in the High Court: String theory for lawyers’ (2013) 87(1) *Australian Law Journal* 33.

<sup>1123</sup> H.L.A. Hart, *Law, Liberty and Morality* (Oxford University Press, 1963) 33.

<sup>1124</sup> Andrew Ashworth, ‘Is The Criminal Law A Lost Cause’, (2000) 116 (2) *Law Quarterly Review*, 225, 253-5.

Ashworth emphasises that the core idea is that ‘if a particular wrong is thought serious enough to justify the possibility of a custodial sentence, that wrong should be treated as a crime, with fault required and proper procedural protections for defendants’.<sup>1125</sup>

### 9.2.1 *The dangers of changing the law*

Changing the law to suit the demands of politicians, the media, or pressure groups, can be fraught with danger. It has been said: ‘the more laws, the more offenders’,<sup>1126</sup> and as Ashworth has argued, these groups often express themselves as if the creation of a new criminal offence is the natural, or the only, appropriate response to a particular event or series of events giving rise to social concern.<sup>1127</sup>

As then Minister of State at the United Kingdom Home Office, Lord Mostyn QC, in response to a parliamentary question, said: ‘offences should only be created when absolutely necessary’. In considering whether new offences be created, he said the factors taken into account should include whether:

- The behaviour in question is sufficiently serious to warrant intervention by the criminal law;
- The mischief could be dealt with under existing legislation or using other remedies;
- The proposed offence is enforceable in practice;
- The proposed offence is tightly drawn and legally sound; and
- The proposed penalty is commensurate with the seriousness of the offence.

Importantly, he said, the Government should also take into account the need to ensure, as far as practicable, that there is consistency across the sentencing framework.<sup>1128</sup> The reality may be different, and while it is not a part of this thesis to in any way defend acts of violence, it can be argued that there are better and more effective ways of eradicating

---

<sup>1125</sup> Ibid 255.

<sup>1126</sup> Thomas Fuller M D; *Gnomologia: Adages and Proverbs; Wise Sentences and Witty Sayings, Ancient and Modern, British and Foreign* (Printed for B Barker at the College Arms near Dean’s Yard, Westminster; and A Bettesworth & C Hitch, 1732) 201.

<sup>1127</sup> Ashworth, above n 1066, 253-5.

<sup>1127</sup> Ibid 255.

<sup>1128</sup> Hansard, HL Deb, 18 June 1999, WA 57 quoted in Simester AP & Sullivan GR, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, (2<sup>nd</sup> ed. 2003) 7-8.

mindless and often drunken violence that leads to catastrophic results, than just changing the law.

### 9.2.2 *Education rather than law change*

Education campaigns, such as the ‘One Punch Can Kill’ organisation, the ‘Matthew Stanley Foundation’, the Thomas Kelly Youth Foundation, the ‘Step Back Think’, and the ‘Real Heroes Walk Away’ campaigns, may be far more effective crime prevention strategies designed to inform youth, in particular, about the consequences of random violence, than are increasingly punitive laws.<sup>1129 1130 1131 1132 1133</sup> For instance, the founder of the ‘Matthew Stanley Foundation’, Paul Stanley said ‘if everyone understood that delivering a king-hit can kill there would be no need for laws like the one-punch homicide provision in Western Australia’.<sup>1134</sup>

Of interest, is the already referred to trial in Newcastle in 2008, where the New South Wales Liquor Administration Board, concerned at the levels of violence outside licensed premises in the city, forced a number of hotels in the CBD to introduce significant restrictions on trading hours. These hotels were to close at 3.30am rather than 5.00am, lock-outs were introduced after 1.30am, and there was a ban on certain drinks, such as shots and doubles after 10.00pm.<sup>1135</sup> The New South Wales Bureau of Crime Statistics and Research sought to determine whether these measures reduced the

---

<sup>1129</sup> Queensland Government, *One Punch Can Kill* (Media Release, December 2007), <http://www.onepunchcankill.qld.gov.au>.

<sup>1130</sup> The Matthew Stanley Foundation is a Queensland pressure group founded by Paul Stanley, the father of 15-year-old Matthew Stanley who died after an assault at a party.

<sup>1131</sup> Step Back Think Organisation, ‘*Step Back Think*’ was formed just days after a Victorian youth James Macready-Brown suffered permanent brain damage from a one-punch attack while out celebrating his 20<sup>th</sup> birthday on October 13 2006, [www.stepbackthink.org](http://www.stepbackthink.org)

<sup>1132</sup> The Thomas Kelly Youth Foundation was set up in honour of Thomas Kelly who died from an unprovoked assault in Kings Cross in 2012, [thomaskellyyouthfoundation.org.au/](http://thomaskellyyouthfoundation.org.au/).

<sup>1133</sup> ‘Join our Real Heroes Walk Away campaign to stop the violence’, News. Com.au, 14 September 2012, <http://www.news.com.au/national/join-our-real-heroes-walk-away-campaign-to-stop-the-violence/story-fndo4eg9-1226473655351>.

<sup>1134</sup> Sharona Coutts, ‘One Punch Can Change Your Life – And Hundreds of Others’, *The Global Mail*, (London) 19 July 2012.

<sup>1135</sup> A ‘shot’ is a small glass designed to hold a measure of spirits or liquor which is drunk, often in rapid succession particularly by the young, in order to reach a state of inebriation in quick time. A ‘double’ is twice the normal measure of spirits in a mixed alcoholic drink. For example, a double gin and tonic.

incidence of assault in the vicinity of these premises,<sup>1136</sup> and found the trial resulted in a 37 per cent decrease in assaults.<sup>1137</sup> A qualitative study of similar restrictions in Queensland reported similar effects, with club owners eventually conceding that the laws improved patron safety, and lead to ‘the development of better business strategies to increase patron numbers’.<sup>1138</sup> There is also research in other countries that suggests restricting alcohol availability may reduce alcohol consumption and associated harm, including violence.<sup>1139</sup> Conversely, research suggests relaxing restrictions on the availability of alcohol, may lead to increased consumption and problems.<sup>1140</sup>

The educative approach has been approved by some sections of the judiciary. New South Wales Chief Magistrate, Mr Graeme Henson, takes the view that education is as important as punishment in dealing with alcohol-related assaults. In an interview with the Australian Broadcasting Commission’s *Four Corners* television program, he suggested a program where offenders are forced to meet victims of alcohol-fuelled attacks, so they can see the devastating consequences first hand.<sup>1141</sup>

A former Queensland District Court judge, Robert Hall, who spent 21 years on the bench said he was ‘fed up’ with people saying longer sentences are the answer to stopping violent crime among young men, believing that adding a community service period to gaol time would be more likely to ‘turn violent offenders and other criminals around’.<sup>1142</sup> That is, he said, if the perpetrators of violent offences were forced to work in places such as emergency departments of hospitals, or for community groups that

---

<sup>1136</sup> Jones, et al, above n 400, 16.

<sup>1137</sup> Ibid; Dan Proudman, ‘Call to extend pub curfew after Newcastle success’, *Newcastle Herald* (online), 16 July 2010, <http://www.theherald.com.au/story/455484/call-to-extend-pub-curfew-after-newcastle>

<sup>1138</sup> Gavan Palk, Jeremy Davy, and James Freeman, ‘Perspectives on the effectiveness of the late night liquor trading lockout legislation provision’ (Paper presented in proceedings of Stockholm Criminology Symposium, 2008).

<sup>1139</sup> Johanna D Birckmayer et al, ‘A general causal model to guide alcohol, tobacco, and illicit drug prevention: assessing the research evidence’ (2004) 34 (2) *Journal Drug Education* 121.

<sup>1140</sup> Robin Room, Thomas Babor and Jurgen Rehm, ‘Alcohol and public health, [2005] *Lancet* 365, 519-530; Angel Desai, ‘Governments confront drunken violence’ (2010) 88 (9) *Bulletin of the World Health Organization* 641.

<sup>1141</sup> ABC TV, ‘Punch Drunk’ *Four Corners*, 25 February 2013, (Graeme Henson).

<sup>1142</sup> Lucy Ardern, ‘Longer sentences ‘not the answer’, Gold Coast Publications Pty Ltd. (online), <http://www.goldcoast.com.au/article/2011/02/19/292931>

helped victims, they may realise how their actions had impacted so tragically on the lives of others.<sup>1143</sup>

### **9.2.3    *Reform of alcohol laws suggested to change violent culture***

Another suggestion to curb the binge drinking that is often said to lead to violent behaviour is to increase the tax on alcohol. There has been a huge reduction in smoking, for instance, thanks to a continual campaign over many years and, of course, massive tax increases.<sup>1144</sup> It is hard to give accurate figures, but one estimate is that a 20 per cent increase in the tax on alcohol, means only a four per cent increase in the cost to the consumer and brings in hundreds of millions in tax revenue.<sup>1145</sup> This is just another indication that there may be better and more effective ways of trying to reduce mindless, and often drunken, violence than by changing criminal laws. For instance, a Brisbane surgeon claimed there had been a notable decrease in the number of injuries caused by late-night violence since the introduction of the ‘Real Heroes Walk Away’ campaign.<sup>1146</sup> ‘It’s opened the public’s eyes’, he said. ‘Something is getting through the alcohol-induced haze; people are starting to slow down a little bit’.<sup>1147</sup>

Notwithstanding these observations, it is arguable that exculpatory provisions should still be available to a person charged with causing a death through a ‘one punch’ killing. This is despite the fact that in a few, isolated cases, defendants may, as it were, ‘walk free’,<sup>1148</sup> despite, in truth, having killed a person. This is because, though not always, they have been able to successfully convince a jury that they did not intend or foresee the death in question, and nor could an ordinary person, in the shoes of the defendant, have foreseen the death as a possible outcome. In any event, by the public becoming

---

<sup>1143</sup> Ibid.

<sup>1144</sup> A spokesman for tobacco company Phillip Morris told the *ABC* since 2007 in Australia the tax on tobacco had risen by 43 percent and a new tax slug by the Federal government on smokers over four years would take that to more than 158 per cent: Emma Griffiths and Simon Cullen, ‘Smokers slugged in Government’s plan to raise \$5.3 billion’, *ABC News* (Australia), 1 August 2013, <http://www.abc.net.au/news/2013-08-01/government-to-raise-5-billion-from-cigarette-tax-increase/4857244>

<sup>1145</sup> Roger Hall, ‘Tax best weapon in booze fight’, *The New Zealand Herald* (New Zealand), 27 March, 2013.

<sup>1146</sup> Daniel Piotrowski, ‘Doctor says violence dropped after Heroes campaign’, (Australia) October 11, 2012, [www.news.com.au](http://www.news.com.au)

<sup>1147</sup> Ibid.

<sup>1148</sup> This phrase, although commonly used, is somewhat misleading as a person who kills another in tragic circumstances may never ever regain their freedom in an absolute sense.

more aware that a single punch can kill, it may mean such an event is foreseeable, leading to juries being less likely to accept an excuse on the grounds of unforeseeability.

#### 9.2.4 *'Hard cases' make bad law*

Legislation introduced in some jurisdictions to close this so-called 'loophole', have simply reinforced the old adage that 'hard cases make bad law'. For example, in Western Australia, (as outlined in Chapter Six) where the government, against the advice of its Law Commission, introduced a new offence of unlawful assault causing death, in an attempt to ensure 'one punch' killers could not avail themselves of the excuse of accident has attracted widespread criticism from the very people it was presumed would benefit; the families of victims.<sup>1149</sup> They claimed the new offence did not provide severe enough penalties, while women's human rights advocates argued the offence was being used as a 'soft option' by defendants in fatal domestic violence cases, where the more appropriate charge was murder or manslaughter.<sup>1150</sup>

Without the excuse of 'accident', a person may be convicted of manslaughter, even though the person's conduct does not create a perceptible risk of death. For example, where a person lightly pushes another who falls over, cracks their head, and dies of a brain aneurism. To charge the offender with so serious offence as manslaughter, violates the important principle that a person's liability for a criminal act should be proportioned to his or her moral culpability for that act.<sup>1151</sup> The wrongdoer should be punished for the unlawful act, and for the death, if he or she is at fault concerning the death, but should not be severely punished for an unfortunate result, merely because the act was unlawful.<sup>1152</sup> For, as Colin Howard has noted, that:

---

<sup>1149</sup> Ball, above n 907, 3; The Women's Council for Domestic and Family Violence Services (WA), above n 907, 1. 'Petition in Relation to the Laying of Charges in Case of Deaths Resulting From Domestic Violence', (Media release 3 May 2012).

<sup>1150</sup> Women's Council for Domestic and Family Violence Services (Western Australia), 'Justice system fails victims of domestic and family violence' (Media Release; 21 November 2012) [http://www.womenscouncil.com.au/uploads/6/1/1/9/6119703/the\\_steps\\_of\\_parliament\\_house.pdf](http://www.womenscouncil.com.au/uploads/6/1/1/9/6119703/the_steps_of_parliament_house.pdf)

<sup>1151</sup> William Wilson, 'What's Wrong with murder'? [2007] *Criminal Law and Philosophy* 157, 162.

<sup>1152</sup> There is a contrary view which was expressed by the then Queensland Labor government in 1995 when it drafted major revisions to the *Criminal Code*. It added a sub-section to the s 23 (accident) which read that 'the result intended to be caused by an act is immaterial to the person's responsibility, unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, completely or partly, by the act. Because the government was voted out that year the revised Code was not implemented.



as a general rule, the law has long since accepted not only that the proper conviction for negligent killing is manslaughter, not murder, but also that even for manslaughter the degree of negligence required is very high.<sup>1153</sup>

Also to be considered, is the appropriateness of the charge, because generally, the offence charged for a 'one punch' killing is manslaughter and only occasionally murder. While these charges are appropriate where strong violence is involved, do they fairly label an offender where death has arisen from a moderate punch, slap or push? In other words, is it fair or just, for a person to be charged with the most serious offences on the criminal ladder, for a crime that has had an unfortunate and unexpected result?

For instance, as will be demonstrated below, United Kingdom courts in sentencing 'one punch' killers in recent years have paid less regard to the *intended*, than to the *actual* consequences of a defendant's actions. This tendency is also apparent in decisions on the relevance of unforeseen consequences to sentencing, although there has been some confusion in the United Kingdom courts on the issue.

### **9.2.5    *Intention or consequence; which should prevail? The UK experience***

Ashworth,<sup>1154</sup> for example, quotes the case of *O'Neill*, where a single punch from the defendant had caused the victim to fall, strike his head on a kerb, and die.<sup>1155</sup> The Court of Appeal held that the sentence should be based on the assault intended, and not on the accidental result. But on similar facts in *Mallet*, the Court of Appeal reached the opposite conclusion, and the sentence took account of the unintended death.<sup>1156</sup>

Ashworth explained the court's confusion on this issue as perhaps excusable, in view of the higher maximum penalties for unforeseen consequences provided by certain other statutes.<sup>1157</sup> For example, reckless driving in the United Kingdom had a maximum of two years (Ashworth's opinion was written in 1978), whereas causing death by reckless

---

<sup>1153</sup> Colin Howard, *Criminal Law* (LBC, 1977) 62.

<sup>1154</sup> Andrew Ashworth, 'Transferred Malice and Punishment for Unforeseen Consequences' in P R Glazebrook (ed.), *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (Stevens, 1978) 87.

<sup>1155</sup> *O'Neill* [1967] 51 Crim LR 241.

<sup>1156</sup> *R v Mallet* [1972] Crim LR 260.

<sup>1157</sup> Ashworth, above n 1096, 89.

driving had a maximum of five years. Similarly, for assault and assault occasioning actual bodily harm, the respective maxima were one and five years. According to Ashworth, in a system based on subjective liability, the legal label attached to the defendant's offence should generally reflect his or her intentional act, and not the chance result. This point was recognised by the James Committee, in proposing the abolition of the crime of causing death by dangerous driving, and by the Criminal Law Revision Committee in proposing the abolition of 'unlawful act' manslaughter.<sup>1158 1159</sup> Ashworth's principal objection is, in reality, a principle of constructive liability - that anyone who chooses to do a criminal act should be held liable for whatever consequences flow from it – which belongs only to a bygone age.<sup>1160</sup>

#### **a) More appropriate charges**

It can be said that preferring a more serious charge like manslaughter, for an unforeseen and unforeseeable death, does little to add to the coherence of the law. Manslaughter is very serious, as is the fact of the loss of a life, but there may be more appropriate charges that reflect the offender's culpability, and also acknowledges the sanctity of life. For example, assault occasioning bodily harm and grievous bodily harm, which carry comparatively high maximum sentences. In Queensland, in the case of assault occasioning bodily harm, the maximum is seven years and for grievous bodily harm a maximum of 14 years.<sup>1161</sup>

It is rare for those convicted of a 'one punch' killing to receive anything like the maxima of assault occasioning bodily harm or grievous bodily harm offences. A recent case in point being *R v Hung*, where a king hit that resulted in the death of a promising footballer, saw the offender sentenced to six years and 10 months imprisonment.<sup>1162</sup>

---

<sup>1158</sup>James Committee (UK) 'The Distribution of Criminal Business between the Crown Court and the Magistrates Courts: Report of the Interdepartmental Committee' (Command Paper Series 6323, 1975), Appendix K, 161 stating that 'the incidence of death may be almost fortuitous'.

<sup>1159</sup> UK Criminal Law Revision Committee, 'Working Paper on Offences Against the Person', (Working paper Vol. 2, 1976) para. 91.

<sup>1160</sup> Ashworth, above n 1096, '89. The concept Ashworth is referring to is contained in the Latin maxim *versanti in re illicit omnia imputantur quae ex delicto sequuntur* which loosely translates as: the mere fact that the offender was engaged in evil is sufficient for him or her to be liable for the consequences that flow from it.

<sup>1161</sup> *Queensland Criminal Code 1899* s 339 Assaults occasioning bodily harm & s 320 Grievous bodily harm.

<sup>1162</sup> *R v Hung* [2012] QCA 341.

This is notwithstanding, that under Queensland legislation, because it was a violent offence, 80 per cent of the head sentence would have to be served; with time already served and good behaviour taken into account, the offender would serve considerably less than the head sentence.<sup>1163 1164</sup> Incidentally, the head sentence of six years is the appropriate tariff for a ‘one punch’ killing in Queensland. A more recent similar case on the Gold Coast resulted in the offender receiving a six year sentence, with parole eligibility after 18 months.<sup>1165</sup>

Earlier, the Queensland Court of Appeal upheld a sentence of six years, for an offender found guilty of manslaughter, when a man he pushed down a short flight of stairs hit his head and died.<sup>1166</sup> And a 16-year-old child was sentenced to five years imprisonment when he fatally punched a 15-year-old at a party.<sup>1167</sup> It is however, difficult to see how courts can set a uniform level of sentence for ‘one punch’ killings because circumstances vary so much that that a guideline judgment would seem to be arbitrary. The Queensland Court of Appeal considered the sentencing range for manslaughter cases involving violence in *The Queen v Bojovic* where the appellant’s sentence of 10 years imprisonment for killing a man by repeatedly punching him in the face was reduced to eight years.<sup>1168</sup> The Court looked at a number of earlier cases to discern a level of sentencing from cases with which some point of comparison could be made. The most applicable, as far as this thesis is concerned were *Cavazza* and *Bliss* where sentences of six years and six and a half years respectively were upheld, with the court in the latter case adding a recommendation for consideration of parole after two years.<sup>1169</sup>

*Cavazza* was again referred to in the more recent case of *R v Major* where the sentencing Judge considered a number of comparable cases before arriving at her

---

<sup>1163</sup> *Penalties and Sentences Act 1992* (Qld) s 161A.

<sup>1164</sup> In fact Hung’s conviction and verdict was set aside on appeal and a new trial ordered. The subsequent trial resulted in a hung jury and a new trial ordered.

<sup>1165</sup> *R v Major* [2013] QCA 114.

<sup>1166</sup> *Seminara* [2002] QCA 131.

<sup>1167</sup> ABC TV, ‘Matthew Stanley’s dad wants killer deported’, *ABC News*, 29 March 2009.

<sup>1168</sup> *The Queen v Bojovic* [1999] QCA 206.

<sup>1169</sup> *R v Cavazza* [1986] QCA 404; *R v Bliss* [1989] QCA.

decision.<sup>1170</sup> In chronological order they were *Cavazza*,<sup>1171</sup> *Bojovic*<sup>1172</sup>, *Tientjes*<sup>1173</sup> and *Simeon*.<sup>1174</sup> However, all these cases were more serious than Major's because of the level of aggression and the number of blows the offenders delivered to their victims. The head sentences varied from between 6-8 years reflecting not only the seriousness of the violence but also other matters which sentencing judges have to take into account such as guilty pleas, criminal history or lack of, remorse, youth etc. Under those circumstances Major's sentence of six years imprisonment with a parole eligibility date of 18 months seems within range. It could however, be argued that there should be more of a disparity in the term of imprisonment to be served where the facts involve one punch as opposed to several which often equate to a severe beating. In New South Wales, the average sentence for manslaughter over the period 2008-2012 was seven years and one month imprisonment, and the average non-parole period, four years and five months.<sup>1175</sup>

As Martin Wasik has written, the key issue in dealing with manslaughter cases is the emphasis which the prosecutor, the court of trial, and the sentence, should properly give to the fact that death has resulted from what the defendant has done.<sup>1176</sup> As the England and Wales Commission said in their Consultation Paper on *Involuntary Manslaughter*,<sup>1177</sup> 'manslaughter is a crime about death, yet the terms of any offences which are created in this area must surely be directed at, and limited to, the causing of death in circumstances which are truly and properly culpable'.<sup>1178</sup> Quoting the England and Wales Criminal Law Revision Committee's (CLRC) 14<sup>th</sup> Report, Wasik notes,<sup>1179</sup> that

---

<sup>1170</sup> Transcript of Proceedings, *The Queen v Kenneth Faron Shawn Lionel Major*, Queensland Supreme Court, Dalton J, (21 September 2012) 2.

<sup>1171</sup> Above n 1160.

<sup>1172</sup> Above n 1159.

<sup>1173</sup> *R v Tientjes* (1999) QCA 480.

<sup>1174</sup> *R v Simeon* (2000) QCA 470.

<sup>1175</sup> Judicial Commission of New South Wales, Judicial Information Research System (JIRS) sentencing statistics concerning manslaughter 2008-2012.

<sup>1176</sup> Wasik, above n 811, 891.

<sup>1177</sup> UK Law Reform Commission, 'Involuntary Manslaughter', (Consultation Paper No. 135, 1994) para. 5, 49.

<sup>1178</sup> *Ibid* para 5, 35.

<sup>1179</sup> Wasik, above n 811, 891.

in a memorandum on punishment issued by the judges, it was agreed that in cases of manslaughter, where death results from an assault, the punishment should pay no regard to the death.<sup>1180</sup> The CLRC recommended that manslaughter, by unlawful act and through gross negligence, should be abolished, leaving liability only where a person causes death with intent to cause serious injury, or being reckless as to death or serious injury.<sup>1181</sup>

More than 60 years later, in *O'Neill*,<sup>1182</sup> the England Wales Court of Appeal said that: 'Where death is accidental to an otherwise simple case of assault, the sentence should approximate to that which would be appropriate for assault, if there had been no fatal consequences'.<sup>1183</sup> Some 18 years later in *McNamara*, the Court stressed the need for the courts to 'disassociate the fact of death from what the appellant did to bring it about'.<sup>1184</sup> In *Ruby*, Lord Lane said that:

In these cases there is an element in the sentence which represents the fact that death has ensued. It is not proper for the Court to treat a case where death results from an unlawful blow, simply on the basis of an assault committed under section 20 of the *Offences Against the Person Act* (1861).<sup>1185</sup>

However, a year afterwards, in the case of *Hughes*, the Court took a dramatically different approach.<sup>1186</sup> The facts were, that a man of good character had struck a man of 62 in the face, and knocked him down. The defendant was dealt with in the Magistrates' Court and, after the prosecution had elected not to proceed with a charge of common assault, the defendant was bound over to keep the peace. Three months later, the victim died from head injuries which he had received in the assault. Hughes was charged with manslaughter and a sentence of two years' imprisonment was upheld by the Court of Appeal. In his judgment, Russell L.J. said:

---

<sup>1180</sup> United Kingdom Criminal Law Revision Committee, '14<sup>th</sup> Report Offences Against the Person' (Command series 7844, 1980) 120.

<sup>1181</sup> *Ibid* paras 116-124.

<sup>1182</sup> *O'Neill* [1967] 51 Crim LR 241.

<sup>1183</sup> *Ibid*.

<sup>1184</sup> *McNamara* [1984] 6 Cr. App. R. (S) 356.

<sup>1185</sup> *Ruby* [1987] 9 Cr. App. R. (S) 305.

<sup>1186</sup> *Hughes* [1988] 10 Cr App R (S) 169.

We live in times of ever-increasing violence and those who indulge in violence must plainly understand that if death ensues as a result of that violence, *however unintended*, (my emphasis) condign punishment must inevitably follow.<sup>1187</sup>

As noted by Wasik, there was no hint of criticism by the Court of Appeal of the prosecution in *Hughes*, for later taking a radically different view of an assault, which initially they had not thought worth pursuing.<sup>1188</sup> It was obviously a change of mind, which was dependant entirely upon the chance outcome of the victim's death.

#### **b) A change in emphasis**

This emphasis in sentencing policy upon the outcome of the defendant's actions, was the subject of an article published in *The Times*.<sup>1189</sup> Judge Rhys Davies wrote that in his view, judges have been much influenced by public opinion into imposing more severe sentences for manslaughter, to mark the fact of the victim's death, as well as the offender's culpability. He stated that 'At one time, the courts would have said, concentrate on the intention, the criminality, but now they are more likely to say take account of the consequences and sentence accordingly'.<sup>1190</sup>

Of course, as Wasik has noted, this is only one judge's opinion, and it might not accurately reflect public opinion.<sup>1191</sup> Nevertheless, the England and Wales Law Commission also recognised that there is a strong feeling in certain sectors of the public, a feeling which may be more fuelled by emotion than by reason, that where a person has caused death by an act of violence, requires the criminal law to deal more severely with the accused.<sup>1192</sup>

#### **c) Consistency of sentencing**

Until recently, English Court's appeared to have arrived at a consistency of sentencing for 'one punch' killers. Discussing the parameters in *R v Coleman*, the Court of Appeal (Criminal Division) was at pains to confine their deliberations to the circumstances,

---

<sup>1187</sup> *Hughes* [1988] 10 Cr App R (S) 169, 170-171.

<sup>1188</sup> Wasik, above n 811, 893.

<sup>1189</sup> Judge Rhys Davies, *The Times* (online), June 28, 1994.

<sup>1190</sup> *Ibid.*

<sup>1191</sup> Wasik, above n 811, 892.

<sup>1192</sup> England and Wales Law Commission, above n 1041, para. 5.8.

where a person receives a blow to the head or face, is knocked over by the blow, and unfortunately cracks his or her head on the floor or pavement, suffers a fractured skull and dies.<sup>1193</sup> It was to be distinguished sharply from the sort of case where a victim on the ground is kicked about the head, or where a weapon is used in order to inflict injury. It was to be further distinguished from where the actual blow itself inflicts the fatal injury.

The Court referred to Watkins LJ in *Phillips* where His Lordship in giving judgment said it was the experience of the Court in cases of manslaughter of this type that a sentence in the region of 12 months' imprisonment, and sometimes *no imprisonment at all* (my italics), is usually considered to be a proper sentence. Coleman received 12 months imprisonment.<sup>1194</sup> In a case shortly before *R v Coleman*, where the deceased was struck with a clenched fist and knocked over so that his head struck the kerbstone and his skull fractured with fatal results, Watkins LJ observed:

If one were to look at the matter from the point of view of the victim and his family, the temptation would be to sentence the person responsible for such a thing to imprisonment for a number of years. But this Court has said this is not the way to look at the matter. Justice is not seen to be done in that way.<sup>1195</sup>

*Coleman* was a 1992 case, and between then until 2005, 19 appeals relating to 'one punch' manslaughters were heard by the England Wales Court of Appeal.<sup>1196</sup> In six of those cases, *Coleman* was expressly followed and applied. Two other cases were also wholly consistent with *Coleman*, and in the other cases, *Coleman* was distinguished as reasons for justifying a longer sentence where more deliberate and intense violence was involved.

It appeared therefore, that where death was an unlikely consequence of the force used, the courts gave a sentence which would have been appropriate had death not occurred.<sup>1197</sup> However, since 2005, the English Courts have taken a more punitive

---

<sup>1193</sup> *R v Coleman* [1992] Crim LR 315.

<sup>1194</sup> *Phillips* [1985] 7 Cr App R (S) 235.

<sup>1195</sup> *R v Goodchild* (unreported, August 12 1991).

<sup>1196</sup> *R v Furby* [2005] EWCA Crim 3147.

<sup>1197</sup> See David A. Thomas, *Principles of Sentencing* (Heinemann, 2<sup>nd</sup> ed, 1979) 83.

stance.<sup>1198</sup> The new approach arose out of a judicial determination to discourage, what was described by the Lord Chief Justice of England and Wales in *R v Furby*, as a ‘growing tendency, particularly in the young, to get drunk in clubs and public houses and then to resort to violence in the streets’.<sup>1199</sup>

#### **d) Guideline Judgments**

Unfortunately, because there is no single category of ‘one punch’ manslaughter cases, there has been no attempt to issue a guideline judgment, which sets a tariff for a sentencing range for a particular offence, and, secondly, differentiates between and analyses aggravating and mitigating factors, in relation to a particular type of offence. They were initiated in the 1970’s by the English Court of Appeal (Criminal Division) under Lord Justice Lawton, and further developed by Lord Chief Justice Lane.<sup>1200</sup> Guidelines in England have been for particular offences, or for types of penalty, or for the type of offender.<sup>1201 1202 1203</sup> The Courts have recognised that sometimes a quantitative measure is not appropriate because of wide variations in the circumstances of an offence, for example, burglary or manslaughter.<sup>1204</sup> In such cases, the guidance is in the form of consideration of aggravating and mitigating circumstances.

Recently, in Australia, the New South Wales Department of Public Prosecutions indicated that it would apply to the New South Wales Criminal Court of Appeal, seeking a guideline judgment in a ‘one punch’ manslaughter case, but its application was subsequently withdrawn before the appeal was heard.<sup>1205</sup> It is doubtful, however, if the Court would have granted the application in any event, judging from the remarks of the New South Wales Chief Justice who, in his leading judgment, remarked that it was

---

<sup>1198</sup> Frances Gibb, ‘One-punch killers to get longer sentences’, *The Times* -(online), 19 December 2009, <http://www.thetimes.co.uk/tto/law/article2215352.ece>; ‘One-Punch killers face new sentences’, *BBC News* (online) 19 December 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/wales/8421526.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/8421526.stm).

<sup>1199</sup> As per The Lord Chief Justice of England and Wales in *R v Furby* [2005] EWCA Crim 3147.

<sup>1200</sup> Chief Justice Spigelman ‘Sentencing Guideline Judgments’, (Address to the National Conference of District and County Court Judges, Sydney, 24 June 1999) 6.

<sup>1201</sup> *Billam* [1986] Cr App R 347.

<sup>1202</sup> *Bibi* [1987] Cr App R 360.

<sup>1203</sup> *Upton* [1980] 71 Cr App R 102.

<sup>1204</sup> *Brewster* [1998] 1 Cr App R 220, 225-227.

<sup>1205</sup> *R v Loveridge* [2014] NSWCCA 120.



not meaningful to speak of ‘one punch’ or ‘single punch’ manslaughter cases as constituting a single class of offences.<sup>1206</sup> Chief Justice Bathurst said the circumstances of these cases vary widely, and attention must be given to the particular case before the sentencing court. He did, however, agree with the United Kingdom decisions concerning the commission of offences arising from alcohol-fuelled conduct in public places, was of great concern to the community, and which called for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence.<sup>1207</sup>

Therefore, perhaps further consideration could be given in Australia to issuing a guideline judgment on ‘one punch’ manslaughter, as it could have a useful role to play. First, in maintaining an appropriate balance between the broad discretion that must be retained to ensure that justice is done in each individual case, and secondly, the need for consistency in sentencing, and the promotion of public confidence in the administration of justice, on the other.

#### **e) A landmark judgment**

In 2009, in what was described as a landmark judgment, the England and Wales Court of Appeal increased the sentences for prisoners found guilty of ‘one punch’ killings.<sup>1208</sup> Welcoming the court’s decision, then Attorney-General, Baroness Scotland, said that changes in the law since the earlier guideline cases, means that crimes which result in death are now dealt with more seriously than before.<sup>1210</sup> The court in *Appleby* did not, however, provide guidance on the extent to which sentences for manslaughter were low.<sup>1211</sup> In his judgement, the Lord Chief Justice of England and Wales, Lord Judge, distinguished *Coleman*, which he said was ‘decided at a time when there was less public disquiet about violent behaviour and death in town and city centres and residential

---

<sup>1206</sup> Ibid 215.

<sup>1207</sup> Ibid 216.

<sup>1208</sup> Attorney General, Baroness Scotland quoted above n 1139, 19 December 2009 (online), [http://news.bbc.co.uk/2/hi/uk\\_news/wales/8421526.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/8421526.stm).

<sup>1209</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>1210</sup> Above n 1139, [http://news.bbc.co.uk/2/hi/uk\\_news/wales/8421526.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/8421526.stm).

<sup>1211</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

streets, than there is now'.<sup>1212</sup> However, his Lordship did not identify any supporting evidence for this view.

That evidence has, however, come from criticism of the relaxing of Britain's alcohol licensing laws in 2005. British Home Secretary, the Right Honourable Theresa May, in calling for the reform of the laws permitting 24-hour drinking in the United Kingdom, said the relaxed laws were one of the major causes of violent street crime. She stated: 'Every Friday and Saturday night our police fight an ongoing battle against booze-fuelled crime and disorder, and our accident and emergency centres handle the casualties'.<sup>1213</sup> The Home Secretary blamed the previous government for extending drinking hours 'without first dealing with the problems of binge drinking'.<sup>1214</sup>

The manslaughter cases Lord Judge was passing judgment on involved, what he described as:

gratuitous, unprovoked violence in the streets, of the kind which seriously discourages law-abiding citizens from walking their streets, particularly at night, and gives the city and town centres over to the kind of drunken yobbery with which we have become familiar, and a worried perception among decent citizens, that it is not safe to walk the streets at night.<sup>1215</sup>

These comments follow on from a decision in *R v Dulu Miah*, where it was said specific attention should be paid to the problem of gratuitous violence in city centres and the streets.<sup>1216</sup> His Lordship also noted that in contrast to *Coleman*, the cases before him involved more than one participant.<sup>1217</sup> It also must be noted that in all three cases, more than one punch was delivered, and in one instance, a particularly vicious martial arts-style kick.

It is salutary to examine the Lord Chief Justice's reasons for his decision, which trace changes in the criminal law in England since the *Coleman* decision, which was widely

---

<sup>1212</sup> Ibid 7.

<sup>1213</sup> Angel Desai, 'Governments confront drunken violence' (2010) 88 (9) *Bulletin of the World Health Organization*, 641.

<sup>1214</sup> Ibid.

<sup>1215</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>1216</sup> *R v Dulu Miah* [2005] EWCA Crim 1798.

<sup>1217</sup> Ibid.

regarded as the ‘benchmark’ for sentencing in ‘one punch’ killings.<sup>1218</sup> Of particular importance, he said, was the passing of the *Criminal Justice Act* 2003, especially s 143(1), which focussed significant importance in the sentencing process of the consequence of every offence, stating that ‘In considering the seriousness of every offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused’.<sup>1219</sup>

The court suggested that this statutory provision was ‘new’, and used it to support its deduction that Parliament had intended additional weight to be given to the harmful consequences of crime, which in cases of manslaughter, is always at its highest level.<sup>1220</sup> The statutory provision expressly required that both the offender’s culpability, and the consequences, actual or potential, intended or foreseen, of the crime, should be expressly addressed in the sentencing decision. Therefore, as described in *R v Wood*, (a case of manslaughter on the grounds of diminished responsibility) Parliament’s intention was clear: crimes which result in death should be treated more seriously and dealt with more severely than before the England and Wales *Criminal Justice Act* 1988.<sup>1221</sup>

At least one scholar however, has queried whether the Court’s construction in *Appleby* will bear this weight.<sup>1222</sup> When the same provision was considered in *Barot*, Lord Phillips, the previous Lord Justice, had referred to ss 142 and 143 of the *Criminal Justice Act 1988* as saying nothing new, and merely being declaratory of the position as it had been before.<sup>1223</sup> Also, as the Chief Justice pointed out in *Appleby*, in manslaughter, culpability may be relatively low, but the harm caused is always at the highest level.<sup>1224</sup>

---

<sup>1218</sup> *R v Coleman* [1992] 13 Cr. App. R (S) 508.

<sup>1219</sup> *Ibid.*

<sup>1220</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>1221</sup> *R v Wood* [2009] EWCA Crim 651.

<sup>1222</sup> Jeremy David QC, ‘Sentencing Policy or Short-term Expediency?’ (2010) (August) (8) *Criminal Law Review* 593, 606.

<sup>1223</sup> *Barot* [2007] EWCA Crim 1119 (2008) 1 Cr. App. R. (S.) 31, 43 & 46.

<sup>1224</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693 para.14.

The modern emphasis in sentencing policy upon the outcome of the defendant's actions, was the subject of comment by Judge Rhys Davies in an article published in *The Times*.<sup>1225</sup> In his Honour's view, judges have been much influenced by public opinion into imposing more severe sentences for manslaughter, to mark the fact of the victim's death, as well as the offender's culpability. The letter was written in 1994. The sentiments seem even more apt now, with the legislature directing judges to adopt more punitive sentences, in cases of unlawful death.<sup>1226</sup> The Law Commission has also recognised that there is strong feeling in certain sectors of the public, stating:

a feeling which may be fuelled more by emotion than by reason, that where a person has caused death by an act of violence, the fact that a death has been caused, requires the criminal law to deal more severely with the accused.<sup>1227</sup>

#### **f) Low culpability and consequent death**

A good example of a case involving low culpability and consequent death was *R v Furby*.<sup>1228</sup> The facts bear repeating, because in many ways they epitomise the issues this thesis addresses. Furby was described as a decent young man. His close friend was unduly sexually familiar with Furby's partner, and she protested violently and physically. Perhaps not unsurprisingly, Furby struck his friend a single moderate blow to the face. A combination of unusual circumstances, including the twisting of the friend's neck by the blow, the angle of the blow, and the dilation of blood vessels that occur in a person who has been drinking, produced a subarachnoid haemorrhage and the friend collapsed. An ambulance was called and the defendant went immediately to his assistance, trying mouth to mouth resuscitation. In the end there was nothing Furby could do for his friend, and he died. His remorse was total. He was convicted of manslaughter after pleading guilty at the first available opportunity. He was sentenced to two and a half years imprisonment and on appeal, it was reduced to 12 months.

---

<sup>1225</sup> Judge Rhys Davies, *The Times* (online), 28 June 1994: 'At one time, the courts would have said, concentrate on the intention, the criminality, but now they are more likely to say take account of the consequences and sentence accordingly.'

<sup>1226</sup> Attorney-General, Baroness Scotland's remarks, that crimes which result in death are now dealt with more seriously which was a reference to the *Criminal Justice Act 2003*, especially s 143 (1) which focussed significant importance in the sentencing process of the consequence of every offence. BBC News, above n 1139, 19 December 2009 (online), [http://news.bbc.co.uk/2/hi/uk\\_news/wales/8421526.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/8421526.stm).

<sup>1227</sup> England and Wales Law Commission, above n 1041, para. 5.15.

<sup>1228</sup> *R v Furby* [2005] EWCA Crim 3147.

However, were *Furby* to come before the Court today, his sentence could be expected to be at least doubled. For example, in the 2010 case of *Church* following *Appleby*, the Court of Appeal increased Church's sentence for manslaughter from one of 20 months, to three-and-a-half years' detention.<sup>1229</sup> Church had been 17-years-of-age when he committed the offence, which was described as a 'one punch' manslaughter case. He pleaded guilty. Thus, in spite of his double jeopardy, Church's sentence was more than doubled. Similarly, the Court of Appeal in the later case of *Lee*,<sup>1230</sup> rejected an application for leave to appeal against a sentence of seven years for a manslaughter conviction, following a 'one punch' killing that involved a powerful blow against a defenceless man. The Court held that the sentence fell within the upper level for such an offence, but it was not manifestly excessive.<sup>1231</sup>

#### **g) Dangerous driving and its consequences**

The Chief Justice also noted similarities with road traffic crime, where the legislative process has directed great importance to the consequence of the driving.<sup>1232</sup> For example, the maximum sentence for causing death by dangerous driving in England and Wales, has been steadily increasing over the years from two years imprisonment, to its present level at 14 years imprisonment.<sup>1233</sup> During this time, offences of causing death by driving under the influence of alcohol or drugs, and causing death by careless or inconsiderate driving, have been created.<sup>1234</sup>

The creation of an offence of causing death by careless or inconsiderate driving, is of particular significance. For many years in the United Kingdom, it had been a summary offence to drive without due care and attention, or without due consideration. The fact that a death occurred as a result was irrelevant to the offence, which remained triable summarily. Where it occurred in consequence of such driving, the offence is now triable on indictment, and subject to a maximum sentence of imprisonment for five years.

---

<sup>1229</sup> *R v Church* [2010] EWCA Crim 351.

<sup>1230</sup> *Lee* [2012] EWCA Crim 835.

<sup>1231</sup> *Ibid.*

<sup>1232</sup> *Ibid* para 20.

<sup>1233</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693 para. 20.

<sup>1234</sup> *Road Traffic Act 1978* (UK) Causing death by inconsiderate or careless driving s 2B.

What is of significance is that, historically, it is very rare indeed for negligence (not gross negligence) to form the basis for criminal liability, yet that is what the offence does. At the same time, the offence of dangerous driving (but without death resulting) remains subject to a longstanding maximum sentence of two years' imprisonment. Although in such cases, the driving itself, viewed objectively as dangerous driving, is more culpable than the negligent driving, encompassed by careless driving. In other words, greater importance has been placed on the consequence of the driving, whether dangerous or careless.

The emphasis in criminal liability, should be upon what the defendant was trying to do, intended to do, and believed he or she was doing, rather than upon the actual consequences of their conduct.<sup>1235</sup> This view was relevantly expressed by Mitchell, in his article 'More thoughts about unlawful and dangerous act manslaughter and the one-punch killer' where he said:

Driving by its very nature is almost inevitably a highly dangerous activity, however careful and competent the driver. A single punch in the face of another person is inherently less dangerous and significantly less likely to cause serious harm. On the other hand, in contrast to driving it is, of course, unlawful, but that simply means that the puncher ought not to have thrown the punch; it does not provide a sufficient rationale for holding the puncher criminally liable for whatever consequences ensue.<sup>1236</sup>

This observation highlights the problem of equating the sentencing levels for offences of such a different character as death, in the context of driving and unlawful act manslaughter. The Courts decision as to whether the offender is guilty of manslaughter, as against being guilty of dangerous driving causing death, will depend upon the degree or extent of his or her culpability in negligence, which is the cause of the death of the person killed.

Returning to alternative offences, if statutory charges like assault occasioning bodily harm were preferred, the fact of a death could be taken into account in the sentence, which arguably would be little different to a manslaughter sentence. The difference

---

<sup>1235</sup> Ashworth, above n 524, '736.

<sup>1236</sup> Barry Mitchell, 'More Thoughts About Unlawful and Dangerous Act Manslaughter and the One-Punch Killer' [2009] *Criminal Law Report* 502, 505.

would be, that the culpability of the offender would more closely resemble the crime for which he or she is charged. That is, in other words, a fairer label.

On the other hand, there is a powerful argument that the alternative offences proposed do not fairly label the act of killing. For example, in New South Wales, the government is considering changing language in legislation relating to ‘one punch’ killings, to reflect what has been described as the ‘gutlessness’ of the king-hit.<sup>1237</sup> This was in response to a call from a victim’s family, who claim king-hits should be referred to as a ‘coward’s punch’.<sup>1238</sup> NSW Police Minister Michael Gallacher told the media that king-hits should not be hidden in words like ‘assault occasioning actual bodily harm’ or ‘assault occasioning grievous bodily harm’ and flagged support for a re-labelling of violent offences so that the wording reflects the ‘gutlessness’ of the king-hit.<sup>1239</sup>

#### **9.2.6 Fairness in labelling**

As argued in Chapter Three, labels do matter. Fair labelling is just one of a number of normative principles governing criminal liability. There is also a duty to be fair. This is recognised in Queensland by the *Director of Public Prosecutions Act 1984* (Qld) under s 11(1) (A)(I) relating to guidelines to all staff of the Office of the Director of Public Prosecutions, and others acting on the Director’s behalf, and to police. The guidelines state that:

the Director of Public Prosecutions represents the community and one of the duties of a prosecutor is to ensure that the prosecution case is presented properly and with fairness to the accused.<sup>1240</sup>

Closely connected with the concept of fair labelling is the principle of consistency, or equal treatment. That is, those who commit wrongs of equivalent seriousness in similar circumstances, should be subjected to censure of a similar magnitude. This is a manifestation of the familiar moral principle that like cases ought to be treated alike. It would greatly assist all concerned in the judicial process for a consistent approach in

---

<sup>1237</sup> AAP, ‘King Hit a ‘coward’s punch’, says family of Daniel Christie and minister agrees’, AAP (online) 3 January 2014, <http://www.theguardian.com/world/2014/jan/03/king-hit-a-cowards-punch-says-family-of-daniel-christie-and-minister-agrees>

<sup>1238</sup> Ibid.

<sup>1239</sup> Ibid.

<sup>1240</sup> Director of Public Prosecutions (Qld), ‘Guidelines To Replace All Previous Guidelines’ (Annual Report, 2002-03) 35.

dealing with those convicted of ‘one punch’ killings. Consistency of charge is one aspect of this approach; the other is consistency of punishment.

### 9.3 Sentencing and punishment

Punishment is one of the aims of the criminal law, but what does it seek to achieve?<sup>1241</sup> Its purpose is well defined in statutory provisions such as Queensland’s *Penalties and Sentences Act* 1992. Section 9(1) of the Act expressly states:

The only purposes for which sentences may be imposed on an offender are –

- (a) To punish the offender to an extent or in a way that is just in all the circumstances; or
- (b) To provide conditions in the court’s order that the court considers will help the offender to be rehabilitated; or
- (c) To deter the offender or other persons from committing the same or a similar offence ; or
- (d) To make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- (e) To protect the Queensland community from the offender; or
- (f) A combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).<sup>1242</sup>

To take these requirements in turn, relating to the conviction of a ‘one punch’ killer:

- (a) Punishing the offender ‘to an extent or in a way that is just in all the circumstances’.

The punishment described would seemed to align with the ‘just deserts’ theory, that offenders deserve to be punished for the crimes they have committed, but the proportionality of the punishment should be linked to the gravity of the offending conduct. This approach is different to the retributive theory that endorses the concept of *lex talionis* of biblical times – ‘an eye for an eye, a tooth for a tooth and a life for a life’.<sup>1243</sup> However, some argue retribution can be seen as a theory of punishment based

---

<sup>1241</sup> Williams, above n 52, 27.

<sup>1242</sup> Similar provisions can be found in the *Crimes Act 1914* (Cth) s 16A; *Sentencing Act 1995* (WA) ss 6-8; *Sentencing Act 1999* (NT) s 5; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1991* (Vic) s 5; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Crimes Sentencing Act 2005* (ACT) s 33; *Sentencing Act 2002* (NZ) ss 8 & 9; *Criminal Code 1985* (Can) ss 718-718.2.

<sup>1243</sup> *The Holy Bible*, Old Testament (The British and Foreign Bible Society, 1611) – *Exodus* 21, 23-25; *Leviticus* 24, 17-22.



on moral blameworthiness, according to which offenders should be punished proportionately to their offence.<sup>1244</sup>

Proportionality is assessed by taking into account the seriousness of the harm caused or risked by the offender, and the degree of the offender's culpability. The difficulty is in determining what factors ought to influence an offender's moral blameworthiness or culpability. As noted from the beginning of this thesis, there is often disagreement over whether the result of an offender's actions affects his or her moral blameworthiness, or whether his or her moral blameworthiness depends solely on their state of mind. Fletcher, for example, writes that to assess a person's 'just desert', we must fathom the kind of person he or she is within the criminal law, and we must rely exclusively on the offender's illegal act as the index of their moral character.<sup>1245</sup> This question is central to whether the criminal law is more justified in punishing more severely a person who has caused death through a punch, than one who has merely committed an assault.

As another example, it is also clear that killing someone by driving dangerously, is more harmful than merely creating a risk of killing by driving dangerously. But it does not explain why a driver who kills deserves more punishment than one who does not. This is because, whether or not a dangerous driver causes death, is a matter of chance. The statutory offence of assault occasioning bodily harm that recognises the death of the victim as a circumstance of aggravation in a 'one punch' killing, contains appropriate penalties. That is, a maximum sentence of seven years imprisonment, which recognises the gravity of the offence while staying within the principle of proportionality.

Given the average sentence for manslaughter in the case of 'one punch' killings ranges from one to five years, AOBH contains sufficient range to ensure any sentence would be just, and would more fairly label the offender for the crime they have committed. Anderson, however, has noted that the notion of 'just deserts' has led to more severity of punishment as it has enabled politicians to introduce more punitive sentencing policies.<sup>1246</sup>

---

<sup>1244</sup> Sally Cunningham, 'Punishing drivers who kill: putting road safety first?' [2007] 27 *Legal Studies* 288, 298.

<sup>1245</sup> Fletcher, above n at 356, 417.

<sup>1246</sup> John Anderson, *Criminal Law Guidebook* (Queensland University Press, 2010) 297.

Therefore, it has been argued, the better approach in the case of offenders convicted of causing the death of a person through a punch, would be to adopt what has been called ‘the principle of penal parsimony’, where the least severe punishment sufficient to censure the offender, is imposed.<sup>1247</sup>

(b) The sentence could also ‘provide conditions in the court’s order that the court considers will help the offender to be rehabilitated’.

Rehabilitative sentencing is designed to prevent further offending by the individual through the strategy of rehabilitation. This may involve therapy, counselling, psychiatric intervention, cognitive behavioural programmes, as well as other methods.<sup>1248</sup> For instance, in the case of a person convicted of a ‘one punch’ death, this would involve anger management, counselling and drug or alcohol rehabilitation, if they were the causes of the offending behaviour, which is often the case for violent offenders. A leading rationale in many European countries, rehabilitative sentencing reached its zenith in the United States in the 1960’s, declined in the 1970’s, and then began to regain ground in the 1990’s.<sup>1249</sup>

As Ashworth has pointed out, the key issue is the effectiveness of the various interventions, and there is a long running debate about the concept and measurement of effectiveness.<sup>1250</sup> The advantage is that certain rehabilitative programmes are likely to work for some types of offenders in some circumstances. It is difficult to accurately predict if this would be the case for the subject of this thesis, the ‘one punch’ killer, but it is one aspect that would have to be considered by the sentencing judge.

(c) To deter the offender or other persons from committing the same or a similar offence.

---

<sup>1247</sup> Michael Tonry, ‘Proportionality, Parsimony and Interchangeability of Punishments’, in Antony Duff, Sandra Marshall, Rebecca Emerson and Russell Dobash (eds), *Penal Theory and Practice* (Manchester University Press, 1994) 60.

<sup>1248</sup> See *Penalties & Sentences Act 1992* (Qld) s9 Sentencing guidelines.

<sup>1249</sup> See, Andrew Von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings in Theory and Policy* (Hart, 2<sup>nd</sup> ed, 1998).

<sup>1250</sup> David C Lloyd, Gareth Mair and Mike Hough, ‘Explaining Reconviction Rates: A critical analysis’, (Home Office Research Study No 135, 1994).

The theory of deterrence rests on the premise of rational utility. That is, prospective offenders will weigh the evil of the sanction against the gain of the imagined crime. This, however, is not relevant to negligent harm-doers, since they have not in the least thought of their duty, their dangerous behaviour, or any sanction.<sup>1251</sup> Furthermore, although it is thought harsh penalties deter others from committing a crime, there does not appear to be any evidence that the principle of deterrence is of much utility where crimes of passion are involved.<sup>1252</sup>

It has been noted that 60 years ago there was a view that, <sup>1253</sup> as Jerome Hall put it, ‘Penalisation for negligent behaviour (regardless of capacity) is an unwarranted repudiation of the principle of *mens rea*; and that although the objective standard is defensible in private and in corrective law, it is invalid in penal law’.<sup>1254</sup> Two reasons were traditionally given for this point of view.<sup>1255</sup> The first was a utilitarian one. The threat of punishment only worked in respect of behaviour that is deliberate and conscious, that is, as a deterrent from acts done with *mens rea*; hence punishing negligence is cruelty without purpose.<sup>1256</sup>

Secondly, it was said to be unfair, for the same reasons as strict liability is unfair: because it involved punishing those who ‘couldn’t help it’.<sup>1257</sup> On the other hand, Herbert Hart has argued there is a clear utilitarian justification for imposing criminal liability for negligent behaviour, in that the risk of incurring it makes a person stop and think.

---

<sup>1251</sup> Jerome Hall, ‘Negligent Behavior Should Be Excluded From Penal Liability’ [1963] *Columbia Law Review*, 632, 641.

<sup>1252</sup> Kevin M Carlsmith, John M Darley and Paul H Robinson, ‘Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment’ (2002) 83 (2) *Journal of Personality and Social Psychology* 284; Johannes Andenaes, ‘The Morality of Deterrence’ (1969) 37 (4) *University of Chicago Law Review* 649, 655-6.

<sup>1253</sup> John R Spencer QC and Marie-Aimee Brajeux, ‘Criminal Liability For Negligence – A Lesson From Across The Channel’ (2010) 59 (1) *International and Comparative Law Quarterly* 1, 19.

<sup>1254</sup> Jerome Hall, *Principles of Criminal Law*, (Bobbs Merrill, 1947) 333.

<sup>1255</sup> Spencer and Brajeux, above n 1185, 19.

<sup>1256</sup> *Ibid.*

<sup>1257</sup> *Ibid.*

The threat of punishment is something which causes him to exert his faculties, rather than something which enters as a reason for conforming to the law when he is deliberating whether to break it or not. It is perhaps more like a goad than a guide.<sup>1258</sup>

Moreover, ‘one punch’ killers are unlikely to be deterred given the fact that they are usually intoxicated and angry, and unlikely to think of the consequences of their actions. In any event, how can an offender be deterred from committing an offence which neither they, nor a reasonable person could foresee, might cause death? Hall argues that no evidence whatsoever supports the assumption that, in some mysterious way, insensitive or negligent persons are improved or deterred by their punishment, or that of other negligent persons.<sup>1259</sup>

Centuries of common law experience have demonstrated that *certainty* of punishment is more effective in deterring potential offenders than severity.<sup>1260</sup> It has also demonstrated that excessive severity may diminish certainty of punishment. That is, when drastic penalties are prescribed for some crimes, jurors are more likely to return a verdict of acquittal, ignoring evidence of guilt and pointed instruction from the trial judge. For example, the crime of dangerous driving causing death. The appropriate charge, in many instances, should be manslaughter, but prosecutors in the United Kingdom and Australia long ago ceased bringing the charge because of a reluctance of juries to bring in guilty verdicts.<sup>1261</sup> As the late Sir Maurice Amos is reputed to have said,<sup>1262</sup> ‘motorists comprise the largest criminal class in England and they try their own offences; for judges, jurymen, and Justices of the Peace, are all of the motoring class’.<sup>1263</sup> The juror could well be thinking, ‘It might have been I’.<sup>1264</sup>

---

<sup>1258</sup> H L A Hart, ‘Intention and Punishment’, Chapter 5 in J Gardner (ed), *Punishment and Responsibility* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 134.

<sup>1259</sup> Hall, above n 1183, 642.

<sup>1260</sup> Ludwig, above n at 741, 61; Andrew Von Hirsch et al, *Criminal Deterrence: an Analysis of Recent Research* (Oxford University Press, 1999) 5-6.

<sup>1261</sup> Law Commission for England and Wales (1996), above n 41, 63; Jonathan Herring and Elaine Palser, ‘The Duty of Care in Gross Negligence Manslaughter’ [2007] *Criminal Law Review* 24; Model Criminal Code Officers Committee, above n 41, 161.

<sup>1262</sup> A British barrister, judge and legal academic who served as an Egyptian judge, advisor to the Egyptian government and was Quain Professor of Jurisprudence.

<sup>1263</sup> Henry Barnes, ‘Liability for Crime’ (1945-47) 9(2) *Cambridge Law Journal* 210, 223.

<sup>1264</sup> J C W Turner, ‘*Mens Rea* and Motorist’, (1933) 5 (1) *Cambridge Law Journal*, 61.

Nevertheless, some judges believe manslaughter should still be the most appropriate charge in serious cases.<sup>1265</sup> According to Turner, the only way in which the charge of dangerous driving causing death can be made comprehensible to rational minds, is by assuming that it was the intention of the legislature to invest the jury with the prerogative of mercy.<sup>1266</sup> They are, in effect, allowed to say: ‘We find the defendant has committed manslaughter, but we shall convict him or her of dangerous driving causing death’. Also, on what basis can it be justifiable to find that dangerous driving causing death is insufficiently unlawful to warrant a manslaughter conviction, but a person who delivers one fatal punch is sufficiently unlawful to attract the consequences of manslaughter?

J.R. Spencer in his classic article ‘Motor Vehicles as weapons of offence’,<sup>1267</sup> calls attention to the case of *Stratton*.<sup>1268</sup> Stratton had an appalling record of driving offences and had been banned for drunken driving in the past. He committed another driving offence while on bail awaiting trial for his present offence. In the instant case he had been drinking, drove through traffic lights on red and impaled a boy on the front of his car. He then drove off at top speed, swerving violently to throw him off. The boy was killed and Stratton was prosecuted for manslaughter. However, the prosecution and the judge agreed to accept a plea to causing death by reckless driving, and Stratton was sentenced to just nine months imprisonment.

In Queensland, a drunken driver with a poor driving record, killed three pedestrians in a hit-and-run incident, and was only charged with dangerous driving causing death, although the Court opined a charge of manslaughter was appropriate in the most serious of cases.<sup>1269</sup> It is difficult to understand what could be more serious than killing three

---

<sup>1265</sup> See the remarks of DM Campbell J in *R v Wooller* [1971] QWN 10. See also *R v Frost; Ex-parte A-G* [2004] 149 A Crim R 151 where Jerard JA noted that the observation of Campbell in *R v Wooller* should not inhibit the Director of Public Prosecutions from charging manslaughter in appropriately serious cases. Helman J specifically agreed with those remarks.

<sup>1266</sup> J C W Turner, ‘The Mental Element in Crimes at Common Law’ (1936-38) 6 (1) *Cambridge Law Journal* 31, 52.

<sup>1267</sup> J R Spencer, ‘Motor Vehicles as Weapons of Offence’ (1985) *Criminal Law Review* 29.

<sup>1268</sup> *Ibid* 35.

<sup>1269</sup> *R v Frost; Ex-parte A-G* [2004] 149 A Crim R 151.

people while driving intoxicated.<sup>1270</sup> The driver was sentenced to nine years imprisonment, with a recommendation that he be eligible for post-prison community based release (PPCBR) after three and a half years. However, the recommendation for early consideration of PPCBR was removed on appeal.<sup>1271</sup>

Nevertheless, compare this with the sentences handed out for convictions of ‘one punch’ violence, where a single death has resulted. For example, in *R v Hung*, where a 21-year-old man was sentenced to six years and ten months gaol after being convicted of killing a 23-year-old man with a single punch.<sup>1272</sup> This would seem to be well out of proportion with the sentences handed down for the more egregious cases of dangerous driving causing death, especially where more than one death was involved. There are many other similar dangerous driving causing death cases as the ones cited above, which reinforce the point concerning the judiciary’s perplexing charging decisions when it comes to causing death by a punch, or causing death to a person, or persons, in a motor vehicle.

There is some evidence however, that the public would be more inclined to convict drunken drivers who cause death more punitively, than the accepted wisdom would have us believe. In Mitchell’s small, qualitative survey of public opinion on specific aspects of homicide and criminal justice, all interviewees thought that the drink-driver who killed a pedestrian while on the way home from the pub, should be convicted of either murder or manslaughter.<sup>1273</sup> They felt the crime ‘causing death by dangerous driving’ was inadequate, because that would ‘glorify it a bit’ or ‘trivialise’ what they had done.<sup>1274</sup>

Nevertheless, legislatures around the world seem to have come to the conclusion that a death was a factor which the public would regard as significant, and the separate statutory offences of manslaughter and dangerous driving causing death (or its

---

<sup>1270</sup> A consultee to the England and Wales Law Commission, n 1041, para. 5.69 gave an example of a case in which the accused blindfolded himself before driving off: a charge of manslaughter would clearly be appropriate in such a case.

<sup>1271</sup> *R v Frost; Ex-parte A-G* [2004] 149 A Crim R 151.

<sup>1272</sup> *R v Hung* [2012] QCA 341.

<sup>1273</sup> Mitchell, above n 78, 453.

<sup>1274</sup> Ibid.

equivalent) were necessary, in the hope that juries would convict motorists who killed or at least causing death by dangerous driving. It should also be pointed out that in the United Kingdom at least, a series of increases in both maximum and guideline penalties for death by driving offences, means that motorists convicted of such offences are now punished more severely than most other involuntary killers.<sup>1275</sup> This really is a manifestation of the dictum, that conduct that kills attracts heavier penalties, than identical conduct that does not.

On the other hand the option of preferring a lesser charge in the case of ‘one punch’ killers, could, in all probability, result in more guilty pleas, and save everyone the expense of protracted trials, where the charge is more serious, that is, murder or manslaughter. Of course, there are good arguments on the other side, that offering jurors a ‘soft option’ would mean justice is not served, especially where a life is lost.<sup>1276</sup> Proponents of this argument should be aware that they also risk the offender walking free as a result of a successful plea of ‘excuse’, which may be more likely to be raised, if the charge is murder or manslaughter. But, to return to sentencing, although deterrence is one of several factors to be taken into account in criminal sentencing, it should not occupy too much time when dealing with acts of violence caused in the heat of the moment.

There is comparatively little modern literature on individual deterrence as more attention seems to have been devoted to general deterrence, which involves calculating the penalty on the basis of what might be expected to deter others from committing a similar offence. Ashworth contends the major utilitarian writers such as Bentham, and economic theorists such as Posner, developed the notion of setting penalties at levels sufficient to outweigh the likely benefits of offending.<sup>1277</sup>

The political premise is that the greatest good of the greatest number represents the supreme value, and that the individual accounts for one; it may therefore be justifiable

---

<sup>1275</sup> Michael Hirst, ‘Causing death by driving and other offences: a question of balance’ (2008) 5 (1) *Criminal Law Review*, 339, 344.

<sup>1276</sup> As noted by former Queensland Chief Justice Paul de Jersey, ‘A Fair Balance of Law’, *The Courier-Mail*, 5 May 2007, 70.

<sup>1277</sup> Andrew Ashworth, ‘Sentencing’, in Maguire, Morgan & Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 4<sup>th</sup> ed, 2007) 993.

to punish one person severely in order to deter others effectively, thereby overriding the claims of proportionality.<sup>1278</sup> While the behavioural premise is that of responsible, and predominantly rational calculating individuals, which, as noted above, does not represent the situation in the case of ‘one punch’ killers. The strength of this reasoning depends on convincing empirical evidence, that people are aware of the level of likely sentences and they restrain themselves from offending mainly because of this knowledge, and not for other reasons.<sup>1279</sup> This evidence does not appear to exist. For instance, a careful analysis of general deterrence research by Von Hirsch *et al* found that there is some evidence of a link between the *certainty* of punishment and crime rates, but considerably weaker evidence of a link between the severity of sentences and crime rates.<sup>1280</sup> Paul Robinson also comments that studies suggest most people are motivated to obey the law, not because they fear being caught and punished (or shamed), but because they believe in the moral weight of the law.<sup>1281</sup> <sup>1282</sup> That is, most people obey the law, not because they fear the pain of criminal sanction, but because they want to do what is right.

(d) To make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved.

A sentence of imprisonment would certainly make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved. Although some, especially the victim’s relatives, may argue AOBH does not provide severe enough imprisonment, the fact is, in a case of a ‘one punch’ killing, charging a person with manslaughter would probably not result in a higher sentence. The concept of denunciation has been criticised by at least one Supreme Court Judge.<sup>1283</sup> At a National Judicial College of Australia Sentencing Conference, New South Wales Justice Ian Harrison, queried why judges make remarks on sentence such as: ‘I am required in

---

<sup>1278</sup> Ibid.

<sup>1279</sup> Alan Norrie, *Crime, Reason and History* (2<sup>nd</sup> ed, Butterworths 2001) 24.

<sup>1280</sup> Von Hirsch et al, above n 1192, 36.

<sup>1281</sup> Paul H Robinson, ‘Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders’ (1999) 83 (4) *Journal of Criminal Law and Criminology* 693, 706-708.

<sup>1282</sup> See Tom R Tyler, *Why People Obey the Law*, (Yale University Press, 1990) chapters. 3, 4. Tyler cites a number of other studies that suggest similar conclusions.

<sup>1283</sup> Justice Ian Harrison, ‘Sentencing Conference Speech’, (National Judicial College of Australia, Australian National University, Canberra, 8 February 2008).



sentencing you to send a message to the community about the serious nature of this offence'.<sup>1284</sup> In cases of 'one punch' killers he described these sort of remarks as 'very silly'.<sup>1285</sup> Judge Harrison asked whether parliament, or the community, really believe that imposing a sentence of four years upon a convicted person, to be served in a violent, degrading environment, will have any bearing at all upon him or her that more significantly influences the prospect of re-offending, than a sentence of two years.<sup>1286</sup> In the case of the 'one punch' killer, who, for the sake of the argument was a law student, is it meaningful to operate upon the basis that the time of the commission of the offence he or she was in any way influenced in their criminal conduct, by the penalties applying to murder or manslaughter?<sup>1287</sup> Furthermore, it would also be unlikely that such a person would be influenced by any consideration of the prospect of detection or apprehension. On the other hand it must be said that it is impossible to quantify the number of people who *have* been deterred from committing a crime of violence either by a combination of factors or because of the knowledge that if caught they will be severely punished.

However, the importance of the deterrence concept still finds the approval of the higher courts for crimes of violence. Recently, one of the successful grounds of a Crown appeal against the sentence of a 'one punch' killer, was the fact that the sentencing judge had failed to take into account the additional need for general deterrence, due to the prevalence of alcohol-fuelled offences of violence.<sup>1288</sup> In his judgment, the Chief Justice said other decisions of the Court had emphasised that violence on the streets, especially by younger men under the influence of alcohol and drugs, is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence.<sup>1289</sup>

(e) To protect the community from the offender.

---

<sup>1284</sup> Ibid 5.

<sup>1285</sup> Ibid 6.

<sup>1286</sup> Ibid.

<sup>1287</sup> Ibid.

<sup>1288</sup> *R v Loveridge* [2014] NSWCCA 120.

<sup>1289</sup> Ibid 103.

Lastly, the community would be protected from the offender during his or her incarceration, which would almost be inevitable on conviction. However, in many instances, it would not be the case that the offender remained a threat to the community after release. The nature of killings involving ‘one punch’, is usually the result of misadventure, and not the consequence of serious criminal behaviour that is ongoing. The question then becomes whether the fact of harm should add to punishment. George Fletcher argues the mixed theories of criminal punishment hold that punishment cannot be justified, unless it is ‘deserved’.<sup>1290</sup> That is, criminal sentences must never exceed the defendant’s ‘just desert’.

Moore argues for a harm-based retributivism, in which the fact of harm has significance for ‘just desert’, independent of the defendant’s culpable acts.<sup>1291</sup> Under this theory, successful murderers would deserve greater punishment than mere attempted murderers. It has to be said that most people would intuitively agree with this theory, that punishment for actually causing harm should be greater than punishment for attempting but failing to cause an identical harm. The point has been made that when a person actually causes an injury, there is greater reason to believe that his or her conduct posed an unreasonable risk of injury than there would have been in the absence of that injury.<sup>1292</sup>

This statement aligns with this thesis, that where two assailants land identical blows on two separate individuals, where one suffers a bruise to the jaw and the other dies from a subarachnoid haemorrhage, then it is justifiable that the assailant who caused the gravest harm should receive the gravest punishment. The ‘just desert’ may be the same for the two wrongful actors, one of whom caused death, and the other who did not, but the judicial system feels more comfortable punishing only the defendant who caused harm, to the full extent of his ‘just desert’. Michael Moore, however, rejects this argument on two grounds:

1. The existence of harm is not good evidence of the degree of culpability of the actor who risked and caused the more serious harm;

---

<sup>1290</sup> Under a mixed theory of criminal punishment, punishment must be morally deserved. In addition, some utilitarian good must come from the punishment before it is justified.

<sup>1291</sup> Moore, above n 469, 237.

<sup>1292</sup> Richards, above n 460, 198, 199.

2. And, in any event, the argument is not about desert, it is about the degree to which the public's ability to judge the actor's desert.<sup>1293</sup>

Others, like Heriot and Fletcher are opposed to Moore's view. Heriot believes the existence of harm will always be relevant to the issue of whether the defendant's conduct posed an unreasonable risk of harm, and will frequently be quite probative.<sup>1294</sup> While Fletcher posits that the average person regards an actual killing as worse than a miss.<sup>1295</sup>

There is another dimension to the *Penalties and Sentences Act 1992* (Qld) and that is Section 9 (2) which states:

In sentencing an offender, a court must have regard to-

(a) Principles that-

- (i) A sentence of imprisonment should only be imposed as a last resort; and
- (ii) A sentence that allows the offender to stay in the community is preferable; and

(b) The maximum and any minimum penalty prescribed for the offence; and

(c) The nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim; and

(d) the extent to which the offender is to blame for the offence; and

(e) any damage, injury or loss caused by the offender; and

(f) the offender's character, age and intellectual capacity; and

(g) the presence of any aggravating or mitigating factor concerning the offender; and

(h) the prevalence of the offence; and

(i) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences.

---

<sup>1293</sup> Michael S Moore, at 469, 241.

<sup>1294</sup> Gail L Heriot, 'The Practical Role of Harm in the Criminal Law and the Law of Tort' (1994) 5 (1) *Journal of Contemporary Legal Issues* 145, 148.

<sup>1295</sup> George P Fletcher, 'Why Is Punishment Imposed For?' (1994) 5 (1) *Journal of Contemporary Legal Issues*, 101, 107.

There are other requirements a Court must have regard to, for instance, time spent in custody for the offence but, for the purposes of this thesis, the above mentioned factors are the salient ones.<sup>1296</sup> Probably 9 (2) (c) ‘the nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim’ and 9 (2) (e) ‘any damage, injury or loss caused by the offender’ would weigh heaviest on a sentencing Court’s mind in a ‘one punch’ killing because there is little doubt an offence where a life is lost is serious and the physical harm is of the gravest character.

Section 9 (2) (f) concerning the offender’s ‘character, age and intellectual capacity’ would be of significance too, especially as many of these tragic incidents involve young people who often lack the mental maturity to deal rationally with physical confrontations especially when under the influence of alcohol or other drugs, and would therefore be an important mitigating factor.<sup>1297</sup> On the other hand, a Court may look less charitably on a more mature offender especially if there was a history of violence which could be viewed as an aggravating factor to be taken into account upon sentence.<sup>1298</sup>

Section 9 (2) (h) ‘the prevalence of the offence’ is a factor that Courts have increasingly viewed as significant.<sup>1299</sup> There may be some argument as to just how prevalent ‘one punch’ killings and alcohol- fuelled street violence are but there is little doubt Courts world-wide are keen to convey a message of deterrence for violent, anti-social, street violence generally.<sup>1300</sup> Certainly, as this thesis has pointed out, governments of all persuasions have been pro-active in formulating stronger legislation to deal with what they see as a serious social problem that needs to be dealt with.

Simester *et al* pessimistically observe that there is no likelihood that the legislature in the United Kingdom, at least, will abolish constructive manslaughter.<sup>1301</sup> They argue the Government does not hesitate to impose heavy penalties based substantially on the fact

---

<sup>1296</sup> *Penalties & Sentences Act 1992* (Qld) s 9 (2) (j)

<sup>1297</sup> Linda Patia Spear, *The Behavioral Neuroscience of Adolescence* (W W Norton, 2010) 144

<sup>1298</sup> See *The Queen v Bojovic* (1999) QCA 206 where the offender who killed a man after a flurry of punches was 46 and had an extensive criminal history including crimes of violence and consequently received an 8 year head sentence with no recommendation for parole after being found guilty of manslaughter.

<sup>1299</sup> *R v Loveridge* [2014] NSWCCA 120, 216.

<sup>1300</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>1301</sup> Simester *et al*, above n 1042, 409, 4.

of causing death, as witness to the increase in the maximum penalty for dangerous driving causing death from five years to ten years imprisonment and then to fourteen.<sup>1302</sup> The heightened concern with the wrongs suffered by the victims of crime, and the relatives of those victims appears, for now, to militate against rational appraisals of culpability in the face of death.<sup>1303</sup> This is intriguing because the trend of development in the law of homicide, up until comparatively recently, has been away from constructive crime.

## 9.4 Constructive Manslaughter

### 9.4.1 History

Constructive manslaughter is the form of involuntary manslaughter which can be committed without gross negligence.<sup>1304</sup> It applies where the accused was engaged in illegal activity at the time when he or she accidentally killed. This is the situation in most cases involving a 'one punch' killing, with the punch constituting the unlawful act, that is, an assault. According to Williams, in Coke's day, the rule was that a killing in the course of any unlawful act was murder.<sup>1305</sup> This led to ludicrous situations, such as where a poacher shooting game out of season and accidentally shot a person secreted in the bushes, could be convicted of murder and hung. Later opinion confined murder to killings in the course of violent felonies.<sup>1306</sup> The new view did not mean that other killings were excusable, for a killing in the course of a non-violent felony was still regarded as manslaughter.

The doctrine of constructive homicide came under heavy fire in the nineteenth century. In 1883, Justice Field said: 'I have a great horror of constructive crime', and so had judges of the eminence of Blackburn and Stephen.<sup>1307</sup> <sup>1308</sup> Furthermore, in 1833, the

---

<sup>1302</sup> *Criminal Justice Act* (1993) (England & Wales) s.67.

<sup>1303</sup> Simester et al, above n 1042, 409.

<sup>1304</sup> Williams, above n 184, 293.

<sup>1305</sup> Ibid.

<sup>1306</sup> Ibid.

<sup>1307</sup> *Franklin*, 15 Cox 163.

codification commissioners Macaulay, and the other Indian Law Commissioners, exposed at some length the injustice of the felony-murder rule as it then existed. Williams quoted four sentences from the Commissioners which, in some ways, sums up the core of this thesis:

To punish, as a murderer, every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life....The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of these offences, and it is an addition made in the very worst way... Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged.<sup>1309</sup>

According to Williams, these words were quoted with approval by the English Law Commissioners of 1845.<sup>1310</sup> Criticising a passage in Foster, to the effect that an accidental killing in the course of conduct of which the judge disapproved for certain reasons was manslaughter, the Indian Commissioners observed:

There are good reasons for prohibiting such a practice, by a direct and substantive law for that purpose; but it cannot be proper to check it indirectly, by making a mere accidental killing amount to manslaughter. Such a course would be, in effect, to make an objectionable practice a crime by indirect means, but as prevention is the proper object of inflicting punishment, such punishment ought, we think, to be directly annexed to the offence to be prevented.<sup>1311</sup>

Again, according to Williams, the matter was discussed by the later Criminal Code Commissioners in 1878 and 1879, and their proposal would have limited the rule to unlawful acts likely to cause death, where the accused was reckless whether death ensued or not.<sup>1312</sup>

Nevertheless, these criticisms of the law had little effect upon judicial rulings, at least where battery or assault was involved. During the nineteenth century, if the accused had committed a battery upon another, no matter that it was not a serious one, and the other died in consequence no matter how unexpectedly, this was uniformly held to be

---

<sup>1308</sup> Peter R Glazebrook, 'Constructive Manslaughter and the Threshold Tort' (1970) 28 (1) *Cambridge Law Journal* 21.

<sup>1309</sup> Williams, above n 184, 294.

<sup>1310</sup> Ibid.

<sup>1311</sup> United Kingdom, *Parliamentary Papers*, (1839), Fourth Report xix, 268-269.

<sup>1312</sup> Williams, above n 184, '295.

manslaughter at least.<sup>1313</sup> The rule continued into the twentieth century and, in some respects, still applies in the twenty-first century. The problem with involuntary manslaughter is the breadth of conduct that can be categorised as involuntary manslaughter. As Lord Lane CJ remarked:

It is a truism to say that of all the crimes in the calendar, the crime of manslaughter faces the sentencing judge with the greatest problem, because manslaughter ranges in its gravity from the borders of murder right down to those of accidental death. It is never easy to strike exactly the right point at which to pitch the sentence.<sup>1314</sup>

In *Alabaster*, the defendant, in a fit of jealousy when his mistress threatened to leave him, caught her by the throat in order to detain her, but not intending to kill her. The woman died after the struggle, and the defendant was charged with murder.<sup>1315</sup> Medical evidence was offered to show that she had not died from suffocation, but was suffering from status lymphaticus, which made her liable to heart failure on the slightest shock. This evidence saved him from a murder conviction, but the judge accepted a plea of guilty to manslaughter. This case is analogous with s 23(1A) of the Queensland Criminal Code, which states that:

the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality, even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm.

A similar case in Queensland today would, in all probability, result in a manslaughter conviction.

In a similar case in 1908, the death was not even brought about by a battery, but only by an assault not amounting to a battery. The defendant chased his wife from the house into the road uttering threats against her and she fell down dead. The post-mortem revealed that the wife was suffering from a persistent thymus gland lying at the base of the heart, which was unusual for a 22-year-old woman. The cause of death was cardiac inhibition, brought about by fear and exertion, in combination with her delicate condition. On these facts, Ridley J ruled that ‘death from fright alone caused by an

---

<sup>1313</sup> Ibid 295.

<sup>1314</sup> *Walker* [1992] 13 Cr App R (S) 474, 476.

<sup>1315</sup> *Alabaster* [1912] 47 L.J. Newsp.397.

illegal act, such as threats of violence, would be sufficient to make it manslaughter', and a conviction followed.<sup>1316</sup>

#### 9.4.2 *Modern cases*

On the other hand, in a more modern case, the English Court of Appeal upheld an appeal where a victim, a 15-year-old girl, died after running away from an affray where she had been assaulted and subjected to threats of violence.<sup>1317</sup> At trial, medical experts testified that the victim had died as the result of an undiagnosed congenital heart condition. The appellants were convicted of affray, but the Appeal Court found that the facts of the case had failed to satisfy the requirements of unlawful act manslaughter, that sober and reasonable persons would recognise the danger that an apparently healthy 15-year-old girl was, in fact, at risk of suffering shock as a result of the affray.

Earlier, in *Dawson*, when an armed robber pointed a gun at a middle-aged man with a diseased heart who then died of a coronary, this was not seen as manslaughter as the medical problem was not reasonably foreseeable.<sup>1318</sup> This is to be contrasted with the case of an 87-year-old man who died from a heart attack an hour and a half after being confronted by a burglar in his home.<sup>1319</sup> The Court of Appeal held that since the appellant must have become aware of the occupant's frailty and old age in the course of his intrusion, he ought to have realised his unlawful act would subject the occupant to a risk of harm. However, in *Ball*, the offender was arguing with the victim, and meaning only to frighten him.<sup>1320</sup> He inadvertently took a live round out of a pocket he knew was partially filled with blanks, and shot and killed the victim. The trial court's test was whether it was unreasonable to act in the awareness of such danger, so manslaughter was preferred instead of murder. The Court of Appeal saw the risk as 'inherent', and within the knowledge of the accused. So foresight was deemed, rather than by reference to the reasonable person.

---

<sup>1316</sup> *R v Hayward* [1908] 21 Cox 692.

<sup>1317</sup> *R v Carey* [2006] EWCA Crim 17.

<sup>1318</sup> *Dawson* [1985] 81 Cr App R 150.

<sup>1319</sup> *R v Watson* [1989] EWCA Court of Appeal (Criminal Division).

<sup>1320</sup> *Ball* [1989] Crim LR 730.



Peter Glazebrook writes that the attraction constructive criminal liability has for contemporary English judges is a little puzzling. Abolished by statute for murder in 1957 (*Homicide Act*, s1), it has taken on a new lease of life among offences against the person, and in manslaughter.<sup>1321</sup> For example, if you intend to cause some trifling personal injury, and happen, unluckily and unexpectedly, to cause him or her grievous bodily harm, you shall be convicted of unlawfully and maliciously causing grievous bodily harm, as if that was what was intended even where it was not.<sup>1322</sup> Or, do something which most people would realise might cause another some slight bodily harm, and the person unfortunately dies, you shall be convicted of manslaughter, even though you had not realised you would cause him or her any harm at all.<sup>1323</sup> This point was acknowledged by David Thomas, who contrasts the different culpability between someone who causes grievous bodily harm in a pub brawl, but where the victim subsequently dies elevates the offence to murder; and another who deliberately but ineffectively tried to kill, and so, whether the failure is due to incompetence or luck, is convicted only of attempted murder.<sup>1324</sup> The outcome, while often the result of chance, decides the severity of guilt.

#### 9.4.3 *Law Commission reports*

The 14th Criminal Law Revision Committee recommended that manslaughter by unlawful act and through gross negligence should be abolished.<sup>1325</sup> It was felt that the unlawful doctrine allowed liability to rest too much on chance, since there need have been no reasonably foreseeable risk that death should follow. The CLRC believed the law should follow Ashworth's principle of correspondence that 'the fault element for a crime should correspond to the conduct element specified for the crime'.<sup>1326</sup> The Committee recognised that there was 'much force' in the argument that cases where

---

<sup>1321</sup> Glazebrook, above n 1232, 21.

<sup>1322</sup> *Mowatt* [1968] 1 QB 421.

<sup>1323</sup> *R v Church* [1966] 1 QB 59; *Lipman* [1969] 3 WLR 819.

<sup>1324</sup> David Thomas, 'Form and Function in Criminal Law', in PR Glazebrook (ed), *Reshaping the Criminal Law*, (Stevens, 1978) 21-36.

<sup>1325</sup> England and Wales Criminal Law Revision Committee, 'Offences Against the Person: Homicide' (14<sup>th</sup> Report, Command paper 7844, 1980) paras 116-124.

<sup>1326</sup> *Ibid* 21.

there is no foresight of death could be dealt with under a proposed offence of causing serious injury with intent to cause serious injury.<sup>1327</sup>

The New Zealand Criminal Law Reform Committee noted in its Report on Culpable Homicide the policy of ‘grading liability according to consequences, rather than a mental element, could be traced back to medieval times’, but a law based ‘on that foundation failed to equate liability with culpability’.<sup>1328</sup> There is much to be said for the notion that gradations of culpability based on varying degrees of intention should be incorporated into the definition of offences, so that the issues can be contested with all that that implies, in terms of the rules of procedure, evidence and quantum of proof.<sup>1329</sup>

#### **9.4.4    *United States experience***

As noted in Chapter One, unlawful act involuntary manslaughter has been severely criticised in the United States as well.<sup>1330</sup> The Model Penal Code abolishes the concept of unlawful act manslaughter, and the modern trend in state homicide law follows this lead. Under the modern view, unlawful acts which result in death are punished as homicide, only when the acts involve a perceptible risk of death. In the *State of Maine v Robert Pray*, a 1977 appeal case, the Supreme Court pointed to the flaw in the concept that a person may be convicted of unlawful act-involuntary manslaughter, even though the person’s conduct does not create a perceptible risk of death.<sup>1331</sup> That is, a person is punished for the fortuitous result, the death, although the jury never has to determine whether the person was at fault with respect to the death. According to the Court, the concept violated the important principle that a person’s criminal liability for an act should be proportioned to his or her moral culpability for that act. Therefore, the wrongdoer should be punished for the unlawful act and for homicide, if he or she is at

---

<sup>1327</sup> Ibid 152.

<sup>1328</sup> New Zealand Criminal Law Reform Committee, ‘Report on Culpable Homicide’ (Report, 1976) paras 46, 47.

<sup>1329</sup> David A. Thomas, ‘Form and Function in Criminal Law’, in PR Glazebrook (ed) *Reshaping the Criminal Law* (Stevens, 1978) 28.

<sup>1330</sup> Hall, above n 186, (Bobbs Merrill, 2<sup>nd</sup> ed. 1960) 258-260; LaFave & Scott, *Criminal Law* (West Group, 1972) 602; I. Wilner, ‘Unintentional Homicide in the Commission of an Unlawful Act,’ (1939) 87 (7) *University Pennsylvania Law Review* 811.

<sup>1331</sup> *State of Maine v Robert Pray* [1977] 378 A 2d 1322.

fault with respect to the death, but should not be punished for a fortuitous result merely because the act was unlawful.<sup>1332</sup>

It is worth examining the essential facts of *Pray*, as it is one in which the excuse of ‘accident’, as it was defined in the Queensland *Criminal Code*, would seemingly apply, and would almost certainly form a strong submission from the defence where the excuse is still applicable. The essential facts were that Robert Pray and his companion went to a bar. The victim was also there, and during the evening both he and Pray became intoxicated. The victim twice fell down in the bar and landed on the back of his head. Later that evening, Pray and his companion were standing on the porch of the bar when a car drove up and the victim got out. He came up the steps of the porch and walked straight at Pray with his arms at his sides. Pray testified that, he was ‘scared’ of the deceased, and knew he ‘could be violent’. Pray’s companion testified that the victim’s appearance showed that there was going to be trouble. As the victim came close to Pray, Pray struck him against his chest with his left forearm. The man staggered backward off the porch and struck the back of his head on the pavement. He died of a fractured skull.

At trial, the defence argued the earlier falls might have caused the fracture, and that Pray acted in self-defence. The State sought and received jury instructions on the theories of voluntary manslaughter, criminally reckless involuntary manslaughter, and involuntary manslaughter as a result of death resulting from an unlawful act, namely Pray’s striking of the deceased with his forearm.<sup>1333</sup> The jury’s verdict of guilty could have been founded on any one of those theories, including the theory of manslaughter resulting from an unlawful act. At the time of the killing, manslaughter, as defined in the Maine Revised Statutes, included certain intentional killings without malice aforethought and ‘manslaughter as defined by the common law’. Thus, the legislature delegated the task of defining involuntary manslaughter to the Courts. In an earlier case (*State v Budge*) the Court defined involuntary manslaughter as an unintended homicide that is neither excused nor justified, that results either from conduct on the part of the

---

<sup>1332</sup> Ibid.

<sup>1333</sup> Ibid.

defendant demonstrating reckless disregard for the safety of others from an unlawful act.<sup>1334</sup>

The Pray jury was instructed in accordance with the *Budge* rules.<sup>1335</sup> The Court of Appeal decided since the common law rules of *Budge* were judge-made rules around which no important reliance interests had developed, they should not be applied when it had become apparent that they were no longer consonant with sound principles of criminal law. The appeal was upheld and a new trial ordered.<sup>1336</sup>

#### 9.4.5 *Empirical studies involving involuntary manslaughter*

In an empirical study investigating involuntary manslaughter, Barry Mitchell and Ron Mackay made a number of interesting points.<sup>1337</sup> Their research showed that more than half of the cases which occurred through anger, domestic row, or a fight, were alcohol-related. That is, the defendant (and possibly also the victim), had been drinking when the fatal act was committed.<sup>1338</sup> This indicates that at the time of the fatal incident, the defendants were not thinking clearly about the consequences of their actions. Thus, to the calm, sober mind, it may be quite foreseeable that death or serious harm would result from the defendants' acts, and that could point to a charge of murder, but more likely a manslaughter charge, because the inference would be that the defendants did not intend to kill, or cause serious injury, or grievous bodily harm. The study showed that the defendants' moral culpability for causing death in the anger, domestic rows, and fight cases, varied considerably. At one end of the spectrum the degree of violence used by the defendant was very minimal, which accords with this thesis that by requiring no more than a foreseeable risk of injury for an unlawful dangerous act manslaughter conviction, the law effectively sets the bar very low.

This thesis has canvassed the arguments relating to the element of moral luck in bringing about deaths in these sorts of cases in Chapter Three, but for present purposes it is sufficient to say that while on the one hand it is argued that by committing an

---

<sup>1334</sup> *State v Budge* [1927] 126 Me 223, 137 A 244.

<sup>1335</sup> *Ibid.*

<sup>1336</sup> *State of Maine v Robert Pray* [1977] 378 A 2d 1322.

<sup>1337</sup> Mitchell and Mackay, above n 439, 165.

<sup>1338</sup> *Ibid* 174.

assault, the defendant has crossed a moral threshold and cannot say it was bad luck. The counterview, as Mitchell and Mackay put it, is that crossing a moral threshold does not negate the fact that there is still a gap between what was foreseen, or foreseeable, and the victim's death.<sup>1339</sup> Therefore, in the cases listed above involving a punch or a slap, the real issue becomes one of finding a way to narrow the gap, to justify liability for manslaughter. This may be achieved by introducing a charge of unlawful assault causing death or, as Mitchell has previously argued 'an unlawful and dangerous act causing death'.<sup>1340</sup>

#### 9.4.6 *Labelling of fatal assaults*

Alternatively, as canvassed in Chapter One, another option is to draw on the *German Criminal Code*, with its offence 'Bodily injury resulting in Death', which sits under manslaughter or *Totschlag* as it is known.<sup>1341</sup> The advantage of having a broad homicide offence such as this, lower down the homicide scale than manslaughter, is that it would not be restricted to deliberate assaults or other violent conduct, but could also apply to cases of fatal neglect.

On the other hand Ashworth is strongly against labelling a person guilty of low level violence causing death with any sort of homicide offence: ‘

If we are not to be governed by the law of the deodand,<sup>1342</sup> or by a raging constructivism, we should have the courage to refuse to label such cases as homicide offences. It is wrong to be influenced by the fact that D was committing an offence by doing the act that caused death, as to turn the offence into homicide even when the final result lies outside the scope of the foreseeable risk created by the risk D was committing’.<sup>1343</sup>

Ashworth appears to be saying that the law should resist wider political considerations and populist calls for homicide convictions in cases of low-level violence, because there

---

<sup>1339</sup> Ibid 175.

<sup>1340</sup> Mitchell, above n 1169, 502.

<sup>1341</sup> *Strafgesetzbuch* [Criminal Code] s 212 (StGB).

<sup>1342</sup> The English common law of deodands traces back to the eleventh century and was applied, on and off, until Parliament finally abolished it in 1846. Under this law, a chattel (i.e. some personal property, such as a horse or a hay stack) was considered a deodand whenever a coroner's jury decided that it had caused the death of a human being. In theory, deodands were forfeit to the crown, which was supposed to sell the chattel and then apply the profits to some pious use. The term deodand derives from the Latin phrase *deo dandum* which means to be given to God.

<sup>1343</sup> Andrew Ashworth, 'Manslaughter: Generic or Nominate Offences?' in Christopher M V Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate, 2008) 242.

is no sound rationale based on moral culpability which is imperative when deciding criminal liability. This is a worthy argument, but in my estimation a compromise must be reached to recognise both sides of the argument, and the best way to achieve this is by reference to charging the existing offences like AOBH or grievous bodily harm, with the fact of death as an aggravating factor in cases involving one-punch killers.

## 9.5 Over Criminalisation

What is also often overlooked is the danger of over-criminalisation. More laws and a more punitive approach to crime can have a far-reaching impact. As noted above, departures from existing law may present substantial difficulties of application in the courts. There is also the principle of minimal criminalisation to be considered. Ashworth argues:

It is the principle that criminal law should not be allowed to grow in an uncontrolled fashion, and that instead there should be constant vigilance towards the boundaries of criminal sanction, constant questioning of whether each new extension is justified, and constant inquiry into whether some other method of dealing with the alleged harm or wrongdoing would be equally appropriate and effective.<sup>1344</sup>

Given the present correctional system, bigger prison populations will probably do as much to foster crime as to prevent it. Moreover, it will result in an increased drain on state financial resources - expenses that so far have not been demonstrated to produce the desired results.<sup>1345</sup> One of the most striking examples of this has been in the United Kingdom, following the introduction of the *Criminal Justice Act* 2003 that required judges to pass longer fixed periods of imprisonment on those convicted of murder. Critics said it would produce a crisis of overcrowding unless more gaols were built, and so it proved to be.<sup>1346</sup>

---

<sup>1344</sup> Ashworth, above n 524, 771; Andrew Ashworth, 'Conceptions of Overcriminalization' (2008) 5 (2) *Ohio State Journal of Criminal Law* 407, 414-15.

<sup>1345</sup> Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals' (2000) 24 *Criminal Law Journal* 19, 34-35.

<sup>1346</sup> John R Spencer, 'The Drafting of Criminal Legislation: Need It Be So Impenetrable?' (2008) 67 (3) *The Cambridge Law Journal*, 585.

### 9.5.1 *Prison populations*

The prison population of England in 2003 was just over 73,000, which was a record in itself. On 22 February 2008 it had increased to 82,068, by 19 February 2010 the population in custody was 83,800.<sup>1347</sup> By 2015 it is projected to rise between 83,300 and 93,000.<sup>1348</sup> According to one critic, the irresponsibility of the Government's failure to anticipate the consequences of the *Act* reforms to sentencing would have been more spectacular without the judicial ingenuity that was brought to bear in interpreting some of its implications.<sup>1349</sup>

In Australia the prison population increased by more than 40 per cent to 24,171 prisoners over the decade to June 2004.<sup>1350</sup> This was higher than the 15 per cent growth in the Australian adult population in the same period. By 2012 the prison population stood at 29,383, an increase of 21 per cent on the 2004 figures.<sup>1351</sup> It has also been reported in Queensland that the State's prison population has increased by a record 23 per cent or 1,268 prisoners during the term of the LNP Government and its 'tough on crime' laws.<sup>1352</sup> The introduction of 'Gross violence' laws in Victoria in 2014 has been predicted to increase the state's gaol population by an extra 200 prisoners within five years.<sup>1353</sup> This will probably increase further with the introduction of the 'one punch' laws that involve mandatory sentences.<sup>1354</sup>

---

<sup>1347</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 22 February 2010, vol 506, col 27 (Jack Straw)  
<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100222/debtext/100222-0004.htm#1002228000191>

<sup>1348</sup> Prison population projections 2009-2015, issued by the *Ministry for Justice*.

<sup>1349</sup> David Jeremy QC, 'Sentencing Policy or Short-term Expediency?' (2010) (August) (8) *Criminal Law Review* 593, 599.

<sup>1350</sup> Australian Bureau of Statistics (Cth), 'Prison population increased by 40% over past 10 years' (Media release No. 178 23 December, 2004).

<sup>1351</sup> Australian Bureau of Statistics (Cth), 'Prisoners in Australia' (Media release, 2 April 2013).

<sup>1352</sup> Tony Moore, 'Paroled inmates unable to find accommodation returning to prison at \$70,000 per year', *Brisbane Times* (online), 8 April 2014, <http://www.brisbanetimes.com.au/queensland/paroled-inmates-unable-to-find-accommodation-returning-to-prison-at-70000-a-year-20140408-369q6.html>.

<sup>1353</sup> Melissa Jenkins, 'Gross violence laws 'won't cut crime'', *The Sydney Morning Herald* (online), 10 November 2011, <http://news.smh.com.au/breaking-news-national/gross-violence-laws-wont-cut-crime-20111110-1n7rh.html>

<sup>1354</sup> Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014(Vic).

There is also the question of costs, because according to the Australian Bar Association's President, Mark Livesey QC, where there is too much to lose and nothing to gain from taking responsibility from an admission of guilt, more cases will run to trial.<sup>1355</sup> That is costly for the courts, the prison system, and traumatic for the families of victims. The trend has not gone unnoticed by the sentencing courts who often take into account the overcrowding of prisons. In *R v Bibi*<sup>1356</sup> Lord Lane CJ said:

It was no secret that prisons at the moment are dangerously overcrowded, to the extent that courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal.<sup>1357</sup>

The causes of the increase in prison population are complex. In 1999, the New South Wales Legislative Council appointed a Select Committee to inquire into factors responsible for the increase in the prison population in New South Wales since 1995, and the consequences of that increase. It found that the prison population can fluctuate considerably as a result of legislative, judicial, and policy changes, irrespective of any changes in actual crimes committed.<sup>1358</sup> For example, the passing into legislation of mandatory prison sentences for violent offences in New South Wales is expected to swell prison numbers.<sup>1359</sup> According to the author of the Australian Prisons Project, Chris Cunneen, if the nine new mandatory sentences removed judicial discretion, as had occurred in the Northern Territory, this would have 'a direct impact on people going to prison'.<sup>1360</sup> A major increase in the remand population appeared to be the most significant contributing factor to the increase in the total number of people in custody. Other factors included longer sentences and increased police activity.<sup>1361</sup>

---

<sup>1355</sup> Australian Bar Association President, Mark Livesey QC, 'ABA opposes Victoria's proposed "one punch" laws with mandatory sentences', (Media Release, 20 August 2014).

<sup>1356</sup> *R v Bibi* [1980] 1 WLR 1193.

<sup>1357</sup> *Ibid* 1194-1195.

<sup>1358</sup> John Ryan MLC, 'Inquiry on the Increase in Prisoner Population', (NCOSS Scales of Justice Conference, Sydney, 25 July 2002) 2.

<sup>1359</sup> Kirsty Needham, 'Mandatory sentencing for alcohol violence could overcrowd prisons' *Sydney Morning Herald* (online), 2 February 2014, <http://www.smh.com.au/nsw/mandatory-sentencing-for-alcohol-violence-could-overcrowd-prisons-20140201-31tx6.html>. Melanie Schwartz & Chris Cunneen, 'Redressing Over-Incarceration, Addressing Human Rights; What Can Justice Reinvestment Do in Australia?' (2014) *Right Now* 16.

<sup>1360</sup> *Ibid*.

<sup>1361</sup> *Ibid*.



### 9.5.2 *Shift in sentencing policy*

Since the 1980s, there has been an increasing shift in sentencing policy towards seeing the purpose of prison as incapacitation, rather than rehabilitation.<sup>1362</sup> The adoption of this purpose clearly favours longer sentences and increased use of incarceration as a means to control crime. Obviously, this increased use of gaol time has led to significant increases in expenditure on programs within prisons.

In the United States, the severe overcrowding in the state prisons has required federal intervention.<sup>1363</sup> A special federal court in 2009 ordered the state of California to shrink its prison population from 202 per cent over capacity, to a maximum of 137.5 per cent, and to accomplish that in two years.<sup>1364</sup> The intervention was in response to concerns overcrowding was at the core of a domino effect of unsafe and unhealthy conditions for those on both sides of the iron bars.

Therefore, it is questionable as to whether Australia should follow the English trend towards more punitive sentences for those convicted of ‘one punch’ killings, if there does not appear to be any measurable benefits. However, the concern regarding over-criminalisation is noted by Australian scholars such as Russell Hogg and David Brown, who accuse law-makers of squandering the criminal law through an ‘uncivil politics of law and order’.<sup>1365</sup>

## 9.6 Conclusion

This chapter has taken a normative approach to the excuse of a lack of foresight as it concerns those charged with fatalities caused by ‘one punch’. It has sought to argue that the way the excuse ought to operate is within a principled and conceptually coherent criminal law system. For instance, whether there are more appropriate charges than manslaughter for the consequences of an illegal act, but one which was not intended to

---

<sup>1362</sup> Ibid.

<sup>1363</sup> Bill Mears, ‘Supreme Court won’t delay release of California inmates’, *CNN* (online), 4 August 2013 <http://edition.cnn.com/2013/08/02/justice/california-inmates-release/index.html>.

<sup>1364</sup> Ibid.

<sup>1365</sup> Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) Chapter 1.

cause death. Also, whether such cases should be more equated to charges like dangerous driving causing death, which more fairly labels the offender.

The effectiveness of the propensity by the courts and legislature to provide tougher sentencing for crimes of violence, especially in the United Kingdom, was canvassed. This exercise revealed that there was no convincing evidence that longer sentences of imprisonment did anything to reduce crimes of violence, and also led to costing issues in terms of an excess of criminalisation and the over- crowding of prisons. On the positive side there were indications, especially in cases of alcohol fuelled violence, other measures, like restricting the trading hours of liquor outlets and funding educative programs, may prove more effective in the long run.



## 10 CONCLUSION

To return to the beginning and our ‘modern day tragedy’, where a young man dies and another faces years of imprisonment as the result of a single punch, but the assailant is able to escape conviction by successfully arguing the excuse of ‘accident’: what have we found, and what can be learnt? In one sense, violence will always be a part of life.<sup>1366</sup> Equally, it is generally recognised, a civilised society must condemn and sanction unlawful acts of violence because of the inherent threat to a safe community.<sup>1367</sup>

In a case such as *Little*, the criminal charges of murder or manslaughter are usually the preferred charges, and in the absence of a defence, the penalties for these crimes are the most serious on the criminal calendar.<sup>1368</sup> For the victim’s family, these are usually seen as the most appropriate charges, but for the offender, whose intention seemingly falls well short of the degree of culpability required for these serious offences, they can appear unfair.<sup>1369</sup> This dichotomy is not resolved, notwithstanding the fact that sentences for manslaughter can vary widely because the degrees of culpability are so wide.<sup>1370</sup>

Nevertheless, it seems incongruous that a person found guilty of manslaughter through the unfortunate consequences of ‘one punch’, is labelled the same as a person guilty of egregious violence falling just short of murder. However, there are other factors at play. The over-consumption of alcohol is a major contributing factor to these regrettable incidents, especially among the young.<sup>1371</sup> For instance, an Australian study found that

---

<sup>1366</sup> Etienne G. Krug et al, *World report on violence and health*, World Health Organisation, 2002, 1-21 [http://whqlibdoc.who.int/publications/2002/9241545615\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf)

<sup>1367</sup> *R v Appleby & Ors* [2009] EWCA Crim 2693.

<sup>1368</sup> *R v Little* (QSC, unreported, 2006).

<sup>1369</sup> For example, in *R v Mallet* [1972] Crim LR 260 where a trivial assault between quarrelling neighbours resulted in a conviction for manslaughter after the victim fell awkwardly and fatally bumped his head on the concrete.

<sup>1370</sup> *R v Blacklidge* (NSWCCA, Unreported, 12 December 1995) (Gleeson CJ, Grove and Ireland JJ agreeing) 3: ‘It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established sentencing tariff which can be applied to such cases.’

<sup>1371</sup> Tian P. S. Oei and Alina Morawska, ‘A cognitive model of binge drinking: The influence of alcohol expectancies and drinking refusal self-efficacy’ (2004) 29 (1) *Science Direct* 159.

‘one punch’ assaults have claimed at least 100 lives across Australia in the past 15 years. The same study also found that 80 per cent of the king hit cases were young males under the influence of alcohol or drugs who were involved in violent altercations at hotels or pubs.<sup>1372</sup> Interestingly, despite assertions from the liquor industry that many assaults were linked to illicit “party” drugs, most cases reviewed involved solely alcohol.<sup>1373</sup>

According to some neuroscientists, young people are often over-represented in offences involving risky behaviour, because of a number of interacting and multifaceted factors.<sup>1374</sup> Immaturity in ventral portions of their prefrontal cortices and other brain regions critical for inhibitory control and decision making, can increase the propensity of adolescents to engage impulsively in risk taking.<sup>1375</sup> Furthermore, laboratory studies have shown that alcohol increases aggression. For example, it increases the willingness with which individuals will administer electric shocks to others.<sup>1376</sup> Therefore, a more nuanced response is called for when dealing with the problem of ‘one punch’ killings and appropriate sentences, rather than just relying on changes to the criminal law to cure all ills.

## 10.1 Unforeseen Events

The community often find it hard to accept that a person who unlawfully assaults another and kills them has caused the death ‘accidentally’, and is therefore entitled to an acquittal.<sup>1377</sup> It is made more complex by the fact that for the purposes of the criminal law there is no formal definition of the word ‘accident’. Unlike some of the Code law

---

<sup>1372</sup> Jennifer Lucinda Pilgrim, Dimitri Gerostamoulous and Olaf Heino Drummer, “King hit” fatalities in Australia, 2000-2012: The role of alcohol and other drugs’ (2014) 135 (February) *Drug and Alcohol Dependence* 130.

<sup>1373</sup> Ibid.

<sup>1374</sup> Jeffery Arnett, ‘Reckless behaviour in adolescence: A developmental perspective’, (1992) 12 (4) *Developmental Review*, 339.

<sup>1375</sup> Linda Patia Spear, *The Behavioral Neuroscience of Adolescence* (W W Norton, 2010) 153.

<sup>1376</sup> Peter R Giancola and Dominic J Parrott, ‘Further Evidence for the Validity of the Taylor Aggressive Paradigm, (2008) 34 (2) *Aggressive Behavior* 214, 229.

<sup>1377</sup> For example, submissions to the Queensland Law Reform Commission’s *Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) by members of the public forcefully made the point that they could not accept that a death resulting from an unlawful assault could be described as an ‘accident’.

states, the common law jurisdictions in Australia do not have specific accident defence provisions in their criminal law legislation; the common law requires *mens rea* and the absence of a defence.<sup>1378</sup> Nevertheless, ‘accident’ or an unforeseen event can be recognised as a defence in common law. For example, where death is the result of an unintentional act, such as a gun going off accidentally or unforeseeably.

This thesis argues the foreseeability test should remain as it recognises the fallibility of human beings, particularly those engaged in unlawful behaviour. Moreover, it also recognises that people should not be held criminally responsible for events that are not intended or reasonably foreseeable. The law also recognises that, in some cases, a seemingly unlawful act can be justified, for example, in self-defence. In most jurisdictions a person has a fundamental right to defend him or herself against personal attack.<sup>1379</sup> On the other hand, inadvertence or negligence can never be justified. But it is just for an accused to plead excuse, which means accepting *some* responsibility but not *full* responsibility. Excuse therefore is at the heart of the matter. A ‘one punch’ killer may accept the responsibility for an unlawful act, but does not accept responsibility for an unforeseen and unforeseeable consequence.

## 10.2 Outcome Luck

There is also the question of how significant a role, luck, or in this case, ‘outcome luck’, should play in the administration of criminal law.<sup>1380</sup> As has been argued throughout this thesis, an assault can result in a sentence no more severe than a good behaviour bond, or it can result in a conviction for the second most serious charge on the criminal ladder. Furthermore, as stated in Chapter Three, it is surely disproportionate, at the very least, where two people engage in identical unlawful conduct and purely as the result of circumstance, one person faces one of the most serious charges in criminal law, while the other is charged with a minor offence. The difference in sentence is solely the result

---

<sup>1378</sup> *Criminal Code 1899* (Qld) s 23; *Criminal Code 1913* (WA) s 23B; *Criminal Code 1983* (NT) s 31; *Criminal Code 1924* (Tas) s 13(1).

<sup>1379</sup> *Criminal Code 1899* (Qld) s 271; *Criminal Code 1995* (Cth) s 10.4; *Criminal Code 2002* (ACT), s 42; *Criminal Code 1983* (NT) s 29; *Crimes Act 1900* (NSW) s 418.

<sup>1380</sup> As noted by Andrew Ashworth, ‘Taking the Consequences’ in S Shute, J Gardner and J Horders (eds), (1993) *Action and Value in the Criminal Law* (Oxford University Press) 120, the law ‘should censure people for wrongs, not misfortunes’.

of the outcome of the admittedly unlawful act. What has been done, and what is morally judged, is often determined by external factors outside the control of the actor. A rational system for judging human behaviour should pay attention to choice, not chance.<sup>1381</sup>

The argument that insists one should take responsibility for one's actions and their consequences is a strong one. However, it ignores the fact that it is difficult to take responsibility for consequences that could not reasonably have been foreseen. This is the case in civil law, why not criminal law?<sup>1382</sup> While such reasoning may be appropriate where the defendant's conduct gives rise to an obvious danger that serious consequences may ensue, often the connection between the unlawfulness of the defendant's act and its dangerousness may be extremely tenuous. An assault, like a single punch that results in death, sometimes fits that category specifically where it results from a heat of the moment, lack of rational thinking (e.g. alcohol affected) and, or, immaturity of judgment (adolescent brain functions).

As it stands in the Australian Code states, the Crown is obliged to establish that an accused intended that the event in question should occur, or foresaw it as a 'possible' outcome, or, that an ordinary person in the position of the accused would have reasonably foreseen the event as a 'possible' outcome.<sup>1383</sup> From the Crown's point of view, there should be no qualms about adopting this test, which on its face seems less favourable to an accused. However, this thesis argues that the term 'likely' outcome should be substituted for 'possible', as it would result in a test that is fairer to the defence, while not necessarily disadvantaging the Crown.

### 10.3 Correspondence and Proportionality

Tipping the scales of justice too far in favour of the Crown, also offends the principle of correspondence. Therefore, the correspondence principle means that not only should it be established that the defendant had the required fault or *mens rea*, it should also be

---

<sup>1381</sup> Nagel, above n 446, 24; Williams above n 453, 115.

<sup>1382</sup> *Donoghue v Stevenson* [1932] AC 562

<sup>1383</sup> For example, *Criminal Code 1899* (Qld) s 23; *Criminal Code 1913* (WA) s 23B; *Criminal Code 1924* (Tas) s 13(1); *Criminal Code 1983* (NT) s 31.

established that the defendant's intention, knowledge or recklessness related to the proscribed harm.<sup>1384</sup> The foreseeability test therefore provides a safeguard to ensuring the correspondence principle is adhered to.

Closely allied to correspondence, is the principle of proportionality. That is, the punishment for a crime should be proportional to that crime's seriousness.<sup>1385</sup> As the High Court acknowledged in *Veen v The Queen (No.1)*,<sup>1386</sup> and restated by that court in *Veen v The Queen (No.2)*,<sup>1387</sup> it is fundamental to the common law of sentencing. Furthermore, breaches of the proportionality principle have also been seen in various jurisdictions around the world as Human Rights violations.<sup>1388</sup>

## 10.4 Fair Labelling

Then there is the labelling of the offender. Assaults that result in death usually see the offender charged with manslaughter, and branded in the public arena as a 'killer'. In many instances this label does not accurately reflect the nature of the guilty act. In other words, the offender is unfairly labelled.

It is often said of manslaughter that it is a most protean offence, because it covers a wide spectrum of offending, from a practical joke gone wrong to a crime falling just short of murder.<sup>1389</sup> It is the latter category which is likely to produce the higher sentence and 'one punch' killers, significant as the consequences are, do not usually fall into the worst category. The basis of this type of manslaughter (because that is what is usually charged) is that the defendant caused the death of another by, or in the course of, performing an act which would have been unlawful whether or not death was caused.

---

<sup>1384</sup> Ashworth, above n 532,) 76.

<sup>1385</sup> For instance, in 1215, three chapters of the *Magna Carta* were devoted to making sure that 'ameracements' were not excessive, Chapters 20-22.

<sup>1386</sup> *Veen v The Queen* (1979) 143 CLR 458.

<sup>1387</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465.

<sup>1388</sup> Van Zyl Smit and Ashworth, above n 607, 541.

<sup>1389</sup> Protean meaning 'variable, taking many forms', *The Budget Macquarie Dictionary* (Macquarie Library, 3<sup>rd</sup> ed, 1998) 321. See for example, *R v Hodgetts and Jackson* [1990] 1 Qd R 456.



The preferable position is that the label applied to an offence ought fairly to represent the offender's wrongdoing. For where an assault has resulted in an unforeseen death, this action would arguably lack the culpability to justify labelling the person a 'killer', because it would not, on most definitions, seem just or fair, especially when the offence of manslaughter varies widely in its seriousness. This approach seemingly has the support of The Law Reform Commission of Ireland, where it recommended a new 'one punch' law, on the basis that manslaughter may otherwise punish assaults causing death too harshly, not the reverse as has been the experience in Australian jurisdictions.<sup>1390</sup>

## 10.5 Foreseeability

Whether a death is a foreseeable consequence as the result of an assault, is at the core of this thesis. It argues that the old 'Queensland' test, that an event (a death) occurs by accident when it is such an *unlikely* (my italics) consequence of a willed act by the accused, that an ordinary person would not have reasonably foreseen it, is the fairest test.<sup>1391</sup> This is because it is both a subjective and objective test rolled into one. The subjective element requires the prosecution to prove beyond reasonable doubt that the death was intended and foreseen by the accused, while the objective element requires the prosecution to prove beyond a reasonable doubt, that death would have been reasonably foreseeable by an ordinary person in the position of the accused. This definition overcomes arguments over whether criminal responsibility should be a solely subjective or objective test. The current test determines that a person is not criminally responsible for an event that:

- (i) the person does not intend or foresee as a *possible* (my italics) consequence; and
- (ii) an ordinary person would not reasonably foresee as a possible consequence.<sup>1392</sup>

The expression of the test in terms of what is a 'possible' outcome, as opposed to what was a 'likely' outcome, results in a test much less favourable to an accused. In *Taiters*,

---

<sup>1390</sup> Law Reform Commission of Ireland, above n 993, [5.39]-[5.43].

<sup>1391</sup> A recent amendment to 23 (1)(b) of the *Criminal Code Act 1899* has explicitly incorporated into the Code words from the cases which defined what an event occurring by accident were. So, s 23 (1)(b) now provides that a person is not criminally responsible for an event that the person does not foresee as a possible consequence and an ordinary person would not foresee as a possible consequence.

<sup>1392</sup> *Queensland Criminal Code Act 1899* s 23.

it was ruled that a trial judge should direct a jury, that in considering the possibility of an outcome, they should exclude possibilities that are no more than ‘remote’ and ‘speculative’.<sup>1393</sup>

Again, this thesis argues such a direction is too generous to the Crown, and there is much to be said for the definition adopted in civil liability legislation, that any risk by a plaintiff to justify negligence, must be foreseeable and not ‘insignificant’.<sup>1394</sup> This term requires a greater degree of probability or likelihood, than the phrase ‘not far-fetched or fanciful’.

There is also much to be said for not attempting a precise definition of foreseeability, because an absolute rigidity of principle often turns out in practice to be unworkable or unfair. However, the excuse is still regarded in some quarters as being too lenient, and offering a ‘get-out-of-gaol card’ for those charged with acts of violence that result in death.<sup>1395</sup> In order to circumvent the excuse, some jurisdictions, as a result of public pressure, have drawn up new laws in which the excuse is unavailable in a bid to make sure any gap in the law is closed.<sup>1396</sup> As has been argued throughout this thesis, such a drastic change to fundamental criminal law principles should be balanced against the rights of the individual, because they have the potential to lead to unintended and unjust consequences, effectively leading to miscarriages of justice.

Perhaps a possible mid-ground consideration might be, as at least one interested party has observed, to reverse the onus of proof for the defence of excuse in a ‘one punch’ killing.<sup>1397</sup> That is, rather than the Crown having the burden of negating the excuse once properly raised on the evidence, it is for the accused to prove the excuse on the

---

<sup>1393</sup> *Taiters* [1997] 1 Qd R 333 at 338.

<sup>1394</sup> For example, s 9 *Civil Liability Act 2003* (Qld).

<sup>1395</sup> Queensland Homicide Victims Support Group, ‘Submission to Department of Justice & Attorney-General’s *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*’, (Submission, October 2007), 15.

<sup>1396</sup> For example, the Criminal Code States like Queensland, Western Australia, Northern Territory and New South Wales.

<sup>1397</sup> Aboriginal & Torres Strait Islanders Legal Services, ‘Submission 025 to the Queensland Parliament Legal Affairs and Community Safety Committee *Safe Night Out Legislation Amendment Bill 2014*’, (Submission, 04 July 2014).

balance of probabilities. This proposal at least retains the excuse albeit in a modified form.

As noted in Chapter Eight, the success of these new ‘one punch’ laws has been mixed at best, and in some instances counter-productive.<sup>1398</sup> That is, in some cases, it has resulted in offenders pleading guilty to a lesser charge, and receiving a lighter sentence as a result, much to the chagrin of those who proposed the new laws in the first place.<sup>1399</sup> One interesting development of the new one punch laws is that they have, especially in Western Australia, strayed into matters of domestic violence, resulting in what the victim’s families regard as unforeseen sentencing consequences.<sup>1400</sup> An analysis of prosecutions between 2008–2012, under s 281 of the *Criminal Code Act* 1913(WA), Unlawful Assault causing death revealed that only a minority of prosecutions included random violence on public streets.<sup>1401</sup> More than 40 per cent of the cases involved men killing their partners or ex-partners, following a history of domestic violence.<sup>1402</sup> Furthermore, sentences have ranged between 18 months (suspended) and five years imprisonment, with an average sentence of two years and nine months, significantly less than what ‘one punch’ killers usually receive when convicted of manslaughter.<sup>1403</sup> It is also worthwhile noting that no law reform commission in Australia has recommended the introduction of a new ‘one punch’ law.<sup>1404</sup>

---

<sup>1398</sup> Women’s Council for Domestic and Family Violence Services (WA), ‘Unlawful Assault Causing Death; Justice system fails victims of domestic and family violence’ (Media Release, 3 May 2012) above n 917,

<sup>1399</sup> Cardy, above n 280.

<sup>1400</sup> Aboriginal & Torres Strait Islanders Legal Services, above n 1318.

<sup>1401</sup> Dr Julia Quilter, ‘The Thomas Kelly case: Why a “one punch” law is not the answer’, (2014) 38 *Criminal Law Journal* 16, 24.

<sup>1402</sup> *Ibid* 25.

<sup>1403</sup> In Queensland, for instance, the tariff for a person convicted of manslaughter for a ‘one punch’ killing in recent years is 6-7 years. See, *R v Hung* QCA [2013] 341; *R v Major* QCA [2013] 114.

<sup>1404</sup> Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008); Western Australia Law Reform Commission, above n 260, 90-91.

## 10.6 The Effect of Prosecuting Decisions

Also, to a certain extent, it is the prosecuting decisions of the DPP, who sometimes appear to ‘over-charge’ ‘one punch’ killers, that fans the flames of public discontent. Often, the offender is initially charged with murder, although later it is found by the prosecution that the law will not support the charge.<sup>1405</sup> Then, further on in the proceedings, the charge is dropped to manslaughter, but not before creating in the minds of the victim’s family and others closely associated with the events, an unrealistic expectation of a very heavy sentence for the most serious offence on the criminal ladder. In other words, it is these charging decisions that sometimes create the basis for later disappointment.<sup>1406</sup>

This is especially true, as often happens, when an offender successfully negotiates to plead guilty to manslaughter, on condition the murder charge is dropped. Of course, at the sentencing hearing, the judge is obliged by law to take into account the guilty plea, and to discount the sentence that might otherwise have been imposed.<sup>1407</sup> And, in the case of an early plea and a genuine demonstration of remorse, the discount can be significant, thus further disappointing the victim’s family.

But, if there is a gap in the law, and this thesis argues there is not, it could be closed by reverting to laws that already exist, not by inventing new laws. For instance, the offence of assault occasioning bodily harm, could take account of the fact of death as an aggravating circumstance. In most jurisdictions, AOBH attracts a maximum penalty of seven years imprisonment, which is ample, considering most people convicted of a ‘one punch’ killing rarely receive a head sentence of anything more than six years, and often, significantly less.

---

<sup>1405</sup> *R v Loveridge* [2013] NSWSC 1638 is a good example. Loveridge was charged with the murder of a youth after his victim died from the result of a punch to the head. According to former New South Wales Director of Public Prosecutions, Nicholas Cowdery, it was never a case of murder because the mental elements of murder could not be proved. That is, intention to kill, intention to cause grievous bodily harm or recklessness. The DPP eventually accepted a plea of guilty to the offence of manslaughter.

<sup>1406</sup> Under the *Director of Public Prosecutions Act 1984* (Qld) relating to guidelines state that there is duty to ensure the prosecution cases is presented properly and with fairness to the accused. Similar guidelines apply in other jurisdictions.

<sup>1407</sup> See for example *Penalties and Sentences Act 1992* (Qld) s 161A.

Alternative offences where death has resulted, are not unknown in other parts of criminal law. For example, as discussed earlier, cases of seriously negligent dangerous driving causing death, should in truth, be sufficient to uphold a charge of manslaughter, instead of dangerous driving causing death.<sup>1408</sup> The fact is, that even in egregious cases of dangerous driving, prosecutors are reluctant to charge manslaughter, because jurors, historically, are reluctant to convict fellow drivers of the more heinous offence.<sup>1409</sup>

This seems at odds with our ‘one punch’ killer, who is usually charged with murder or manslaughter, with no option of a lesser charge, but whose culpability is often less than the dangerous, drunken driver. Why then should a dangerous driver who causes death be able to avoid a manslaughter charge, and all the opprobrium that offence attracts, yet a person who *accidentally* causes death as a result of a minor assault, be faced with two of the most serious offences in criminal law? If legislators believe jurors (despite evidence to the contrary), are susceptible to allowing those accused of killing through one punch to avail themselves of the excuse of accident, then charging them with a lesser offence makes sense.<sup>1410</sup> This is notwithstanding the counter-argument that an offender who punches a victim intends by that punch to cause *some* harm, not necessarily the harm that ensues but harm nevertheless, whereas a dangerous driver may not necessarily set out to cause harm to another but harm does result.

Therefore, to summarise, the basis of this thesis has been to take a normative approach to the question of the relevance of the excuse of a lack of foresight, as it concerns those charged with fatalities caused by ‘one punch’. At its core is the notion of fairness using a comparative analysis of other, not dissimilar criminal offences.

---

<sup>1408</sup> See the remarks of DM Campbell J in *R v Wooller* [1971] QWN 10; and *R v Frost; Ex-parte A-G* [2004] 149 A Crim R 151.

<sup>1409</sup> J R Spencer, ‘Motor Vehicles as Weapons of Offence’ (1985) *Criminal Law Review* 29.

<sup>1410</sup> See for example, Queensland Law Reform Commission, above n 1, 36, where it was reported the results of a Queensland Department of Justice & Attorney- General audit found that, in practice, the excuse of accident was rarely successful.

## 10.7 Consequences v Criminality

The seemingly worldwide trend towards concentrating on the *consequences* of a crime, instead of looking towards the *criminality* of the offender, is a worrying development, especially as there does not seem to be any reason consistent with justice for doing so.<sup>1411</sup> Of course, it is entirely understandable that the community is concerned with the senseless deaths of young men (primarily), and that the legislature responds to calls that ‘something should be done’ about these tragedies. But a ‘knee-jerk’ style response, by increasing penalties or creating new offences in order to look ‘tough on crime’, is a political short-term solution, and not a legal or logical one based on jurisprudential and neuroscience evidence.<sup>1412</sup>

This thesis argues that there are better and more effective ways of trying to eradicate usually drunken, mindless violence that leads to catastrophic results, than responding to penal populism by changing perfectly efficient systems of law. For example, education campaigns and restrictions on hotel trading hours, both in Australia and other jurisdictions, have resulted in decreases in assaults, more than in any changes to the criminal law.<sup>1413</sup> Programs provided by Corrective Services for violent offenders and those who have alcohol issues, have also proved effective.<sup>1414</sup>

Anecdotally at least, there is some evidence that education campaigns are connecting with young people. As previously noted, in December 2007 the Queensland Government launched its ‘One Punch Can Kill’ campaign, in the hope that the

---

<sup>1411</sup> For example, the England & Wales *Criminal Justice Act* 2003 s 143(1) which focuses significant importance in the sentencing process of the consequence of every offence; Wasik, above n 811, , 883; Gibb, above n 1005, ‘One-punch killers to get longer sentences’, *The Times* -(online), 19 December 2009, <http://www.thetimes.co.uk/tto/law/article2215352.ece>. Decisions of the NSW Court of Criminal Appeal have emphasised that violence on the streets, especially by young men in company and under the influence of alcohol and drugs, is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence: *R v Loveridge* [2014] NSWCCA 120; *R v Mitchell*; *R v Gallagher* [2007] NSWCCA 296.

<sup>1412</sup> P T Elikann, *Tough-On-Crime Myth: Real Solutions To Cut Crime* (Insight Publishing Co, 1996) 239.

<sup>1413</sup> New South Wales Bureau of Crime Statistics and Research, ‘NSW Recorded Crime Statistics March 2014’ (*Quarterly Report*, 2 June 2014) 4; Birckmayer *et al*, above n 962.

<sup>1414</sup> Rolf Loeber and David P Farrington (eds), *Serious & Violent Juvenile Offenders – Risk Factors and Successful Interventions* (Sage Publications, 1998). Queensland Corrective Services (QCS) offers a range of programs and interventions to prisoners in custodial centres and offenders on probation or parole to lower the risk of their re-offending.

consequences of fatal assaults would eventually become common knowledge, and as a result, juries would be less likely to find that the death of a person through ‘one punch’ was unforeseeable.<sup>1415</sup> In 2009, Wally Hung was convicted of manslaughter for a ‘one punch’ attack that resulted in the death of another young man.<sup>1416</sup> During police questioning, Hung was asked whether he was aware of the ‘One Punch Can Kill’ campaign. Hung admitted to police that he was aware of the campaign and its message.<sup>1417</sup> It is also of some consequence, that since the Little and Moody acquittals that sparked the then Queensland Attorney-General’s review of the excuse of accident in 2007, there has been only one similar case in Queensland, where an accused has been acquitted of manslaughter on the grounds of unforeseeability, or, as it was formerly known, as ‘accident’.<sup>1418</sup>

This turn of events tends to suggest that taking steps to reduce gratuitous violence that leads to a ‘one punch’ killing, does not necessarily mean a need to change the law. There is also no credible evidence that tougher sentences result in a reduction in crimes of violence.<sup>1419</sup> It must also be remembered that many of the offenders in ‘one punch’ killings are young men, and courts have an inclination to leniency in the case of young offenders.<sup>1420</sup> The purpose of this approach is to give young offenders a chance to rehabilitate themselves to ensure they do not become part of the criminal justice system in the future.<sup>1421</sup> This surely is a good thing because a ‘crushing’ sentence would negate any chance of rehabilitation, as it would destroy any reasonable expectation of useful life after release.<sup>1422</sup>

---

<sup>1415</sup> Queensland Government, above n 1071, <http://www.onepunchcankill.qld.gov.au>

<sup>1416</sup> *R v Hung* [2012] QCA 341.

<sup>1417</sup> *Ibid* 5.

<sup>1418</sup> *R v McGuire* (Unreported, Bundaberg Supreme Court, 23 August 2012).

<sup>1419</sup> Ludwig, above n 741, 51, 63.

<sup>1420</sup> In *R v Mills* [1998] 4 VR 235 (CA) the Court accepted that the youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter arises.

<sup>1421</sup> *Ibid*.

<sup>1422</sup> In *Cranssen v The King* (1936) 55 CLR 509, 521 (Dixon, Evatt and McTiernan JJ) referred to the sentence of imprisonment as: ‘A crushing punishment bearing no proportion to either the impropriety of the applicant’s conduct or the kind of penalty which suffice as a deterrent.’

On the other side of the coin a sentencing court has to take into account that a life has been lost because of the offender's actions. In Queensland a judge is statutorily bound to do so under s 9 (2) (c) of the *Penalties & Sentences Act 1992* (Qld).

## **10.8 Addressing Social Influences More Effectively**

Therefore, governments generally would be better off applying themselves to better controlling the effects of alcohol and other drugs in society, especially among the young, and allowing the judicial system to apply the law in an independent fashion. It has been argued that there does seem to be an insistence by some sections of the public that people who cause a death must be convicted of some sort of homicide.<sup>1423</sup> To what extent this concern is driven by the media or politicians wishing to beat the 'law and order' drum for political purposes is difficult to discern. What research that has been carried out seems to suggest the public, when apprised of the facts, are less punitive than the media gives them credit for.<sup>1424</sup>

## **10.9 Closing a Gap in the Law**

Therefore this thesis argues, that 'one punch' killers can be justly dealt with by employing the charges that are already available, other than manslaughter, to deal with a person accused of a 'one punch' fatality. For example, assault occasioning bodily harm and grievous bodily harm are offences which presently carry high maximum sentences. If these charges were preferred in the alternative, the fact of death could be taken into account, and it would have the added advantage that the culpability of the offender would more closely resemble the crime for which he or she is charged; in other words, a fairer label. It also avoids the danger that a 'one punch' assault that results in a terrible unforeseen consequence would mean a very harsh outcome if the penalties such as those

---

<sup>1423</sup> Queensland Law Reform Commission, above n 1, 231.

<sup>1424</sup> See for example, Mitchell, above n 1002,  
<http://www.barristermagazine.com/barrister/index.php?id=30>.



recently introduced in New South Wales and Queensland remain on the statute books.

1425

Alternative offences where death has resulted are not unknown in other parts of criminal law. For example, as discussed earlier, dangerous driving causing death where the elements justify a charge of manslaughter, especially in serious cases of dangerous driving, is an alternative offence, but where the prosecution usually charges the lesser offence. The trend towards concentrating on the consequences of a crime, rather than the criminality of the offender, is concerning, especially as there does not appear to be any convincing reason for doing so. There are, it has been argued, better and more effective ways of eradicating mindless drunken violence, than resorting to penal populism.<sup>1426</sup> For example, initiatives such as restricting alcohol trading hours and funding educational anti-violence programs particularly for youth have been put forward as more effective means of crime prevention.<sup>1427</sup>

Of course, this does not mean the charge of manslaughter should not be employed for all ‘one punch’ killings. There are, it is readily conceded, circumstances where a ‘one punch’ killing, for example in the case of a powerful king hit, that a charge of manslaughter or even murder may be appropriate.<sup>1428</sup> However, these should not be the only verdicts for a jury’s consideration in the case of ‘one punch’ killings. That is, juries should not be deprived of the opportunity of exercising their judgment as to the appropriate charge, depending on the circumstances. This is notwithstanding the difficulties that arise from compromise verdicts.

Therefore, the ‘one punch’ killer should, if the circumstances merit it, be charged with manslaughter, or at the very least an alternative charge such as assault occasioning bodily harm with death as an aggravating circumstance, to be taken account of in

---

<sup>1425</sup> See *Amendment of Crimes Act 1900* (NSW) s 25A Assault causing death, where the maximum sentence of 20 years jail for a ‘one punch’ killing is now in force.

<sup>1426</sup> Jones et al, above n 400.

<sup>1427</sup> These initiatives have been persuasively argued by the Queensland Government’s ‘One Punch Can Kill’ campaign, the ‘Step Back Think’ organisation and the Thomas Kelly Youth Foundation set up in honour of a one-punch victim.

<sup>1428</sup> For example, *R v Loveridge* [2013] NSWSC 1638 where the offender king hit an unsuspecting victim, who died, after earlier seriously assaulting four other people on the same night and where he had publicly boasted before the assaults that he had a desire ‘to bash someone.’

sentencing. The offender should still be able to avail him or herself of the 'excuse' of lack of foreseeability, and, if successful, be acquitted according to law. Equally as important, serious consideration should be given to introducing more restrictive alcohol laws to ensure the circumstances of reckless behaviour, caused by the over consumption of alcohol, arise less frequently than is presently the case throughout the western world.

This highly emotive topic is clearly complex and multi-factorial where legal and social dimensions intersect. The key conclusion of this thesis is that justice must be done to the offender, to the victim and the community. This is in the interests of the criminal justice system which should be founded on fair, consistent, coherent and logical principles. The analysis throughout this study and its conclusions demonstrates that if the goal of justice is to be more closely approximated by the criminal justice system, then further attention to this topic by the law reform process is warranted.



## ***Bibliography***

### **A. Articles/Books/Reports**

Aas, Katja F, *Sentencing in the age of information: from Faust to MacIntosh*  
(Glasshouse Press, 2005)

Andenaes, Johannes, 'The Morality of Deterrence' (1969) 37(4) *University of Chicago Law Review* 649

Anderson, John, *Criminal Law Guidebook* (Queensland University Press, 2010)

Arnella, Peter, 'Convicting the morally blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39(6) *University California Law Review*, 1511

Arnett, Jeffery, 'Reckless behaviour in adolescence: A developmental perspective', (1992) 12(4) *Developmental Review*, 339

Ashworth, Andrew, 'The Elasticity of Mens Rea' in C.F.H. Tapper (ed), *Crime, Proof and Punishment: Essays in memory of Sir Rupert Cross*, (Lawbook, 1981)

Ashworth, Andrew, 'Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law, (1988) 19 (3) *Rutgers Law Journal*, 725

Ashworth, Andrew, 'Taking the Consequences' in S. Shute, J.Gardner and J. Horder (eds) *Action and Value in the Criminal Law* (Oxford University Press, 1993)

Ashworth, Andrew, 'Is the Criminal Law a Lost Cause?' (2000) 116(2) *Law Quarterly Review*, 225.

Ashworth, Andrew 'Sentencing', in Maguire, Morgan & Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2007)

- Ashworth, Andrew, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law', (2008) 11 *New Criminal Law Review* 232
- Ashworth, Andrew, 'Manslaughter: Generic or Nominate Offences?' in Christopher M V Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate, 2008)
- Ashworth, Andrew, 'Conceptions of Overcriminalization' (2008) 5(2) *Ohio State Journal of Criminal Law* 407
- Ashworth, Andrew, *Principles of Criminal Law*, (Oxford University Press, 2009)
- Austin, John L, *Lectures on Jurisprudence or The Philosophy of Law* in R. Campbell (ed) Two vols , (John Murray, 1879)
- Austin, John L, 'A Plea for Excuses' in H. Morris (ed) *Freedom and Responsibility* (Stanford University Press, 1961)
- Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report 103 (2006) 133
- Bargaric, Mirko, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals' (2000) 24 *Criminal Law Journal* 19, 34-35
- Bagaric, Mirko and Kenneth J. Arenson, *Criminal Laws in Australia* (Oxford University Press, 2007)
- Barnes, Henry, 'Liability For Crime' (1945-47) 9(2) *Cambridge Law Journal* 210
- Bayles, Michael D., 'Character, purpose and criminal responsibility' [1982] *Law and Philosophy* 5
- Beale, Sara S, 'The news media's influence on criminal justice policy: How market-driven news promotes punitiveness', (2006) 48(2) *William and Mary Law Review* 397

- Beckett, Katherine, *Making Crime Pay: Law and Order in Contemporary American Politics* (Oxford University Press, 1997)
- Bell, Don, *The Man Who Killed Houdini* (Vehicule Press, 2004)
- Bennett, GJ and B Hogan, 'Criminal Law and Sentencing' in *All E.R. Annual Review* (The Law Journal, 1983)
- Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation, Volumes One and Two* (T. Payne & Son, 1823)
- Berman, Mitchell N., 'Justification and Excuse, Law and Morality (2003) 53(1) *Duke Law Journal*, 27
- Binavince, Emilio S., 'The Ethical Foundation of Criminal Liability' (1964) 33(1) *Fordham Law Review*, 1
- Birch, Diane J., 'The Foresight Saga: The Biggest Mistake of All?' [1988] *The Criminal Law Review* 4
- Birckmayer, Johanna D et al, 'A general causal model to guide alcohol, tobacco, and illicit drug prevention: assessing the research evidence' (2004) 34(2) *Journal Drug Education*, 121
- Blackstone, William, *Commentaries on the Laws of England* (Clarendon, 1796)
- Bohlander, Michael, 'Homicide and Non-fatal Offences: Mens Rea' (2006) 70(6) *The Journal of Criminal Law* 482
- Boston, Bruce, 'The New Italian Criminal Code [1889] *Law Quarterly Review* 287
- Burgess, Melissa and Steve Moffat, 'The Association between Alcohol Outlet Density and Assaults on and around Licensed Premises', (2011) 147 *Crime and Justice Bulletin*, 1

- Burkhardt, Bjorn, 'Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?' [1986] *Brigham Young University Law Review* 553
- Bracton, De Legibus et Consuetudinibus Angliae, 101b. Cf. Coke, *Third Institute* (1641) 6
- Bronitt, Simon and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co., 2010)
- Buchanan, Alec, *Psychiatric Aspects of Justification, Excuse and Mitigation: The Jurisprudence of Mental Abnormality in Anglo-American Criminal Law* (Jessica Kingsley, 1999)
- Burke, Liam, 'One Punch Can Start Moral Panic: An Analysis of News Items About Fatal Assaults In Queensland between 23 September and 28 February 2009' (2010) 10(1) *Queensland University of Technology Law Journal*, 87
- Burns, J H and Hart, H L A, *Jeremy Bentham: Introduction to the Principles of Morals & Legislation* (Methuen, 1982) 17
- Callanan, Valerie J, *Feeding the Fear of crime: Crime-Related Media and Support for Three Strikes* (LFB, 2004)
- Carlsmith, Kevin M, John M Darley and Paul H Robinson, 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83(2) *Journal of Personality and Social Psychology* 284
- Chalmers, James and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *The Modern Law Review* 217
- Cicero, Marcus Tullius, 'Chapter 2' in Clarence Morris (ed), *The Great Legal Philosophers: Selected Readings in Jurisprudence* (University of Pennsylvania, 1959)

- Clarkson, Christopher M V, 'Context and Culpability in Involuntary Manslaughter' in Ashworth and Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000)
- Clarkson, Christopher M V, 'General Endangerment Offences: The Way Forward?' (2005) 32(1) *University of Western Australia Law Review* 131
- Clough, Jonathan and Carmel Mulhern, *Criminal Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2004) 3
- Cohen, Stanley, *Folk Devils and Moral Panics* (Routledge, 2002)
- Colvin, Eric, 'Causation in Criminal Law' (1989) 1(2) *Bond Law Review* 253
- Colvin, Eric, 'Exculpatory Defences in Criminal Law' (1990) 10(3) *Oxford Journal of Legal Studies* 381
- Colvin, Eric, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 (2) *Monash University Law Review* 197
- Colvin, Eric, and Justice John McKechnie, *Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworth, 2012)
- Cowdery, Nicholas, *Getting Justice Wrong: Myths Media and Crime* (Allen & Unwin, 2001)
- Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 6.
- Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, Fourth report (1977)
- Criminology Research Council, *Jury Sentencing Survey*, Report (2010)



- Crofts, Thomas, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia', winter [2008] *Oxford University Commonwealth Law Journal* 187
- Cross, Rupert, 'The Making of English Criminal Law Sir James Fitzjames Stephen' (1978) 6 *Criminal Law Review* 652
- Cullen, Jane, 'WA'S 'One-Punch Law: Solution To A Complex Social Problem Or Easy Way Out For Perpetrators Of Domestic Violence' (2014) 2(1) *Griffith Journal of Law & Human Dignity* 52
- Cunningham, Sally, 'Punishing drivers who kill: putting road safety first?' [2007] 27 *Legal Studies* 288
- Davidson, Donald, *Essays on Actions and Events* (Oxford University Press, 2001)
- Davis, Colleen, 'Intoxicated Victims and the Accident Excuse under the Queensland Criminal Code' (2009) 16(3) *James Cook University Law Review* 42
- Davis, O.C.M., 'Accidental Homicide' (1938) 2 *Journal Criminal Law* 581
- DeDeo, Simon, Sara Klingenstein, and Tim Hitchcock, 'The Civilising Process in London's Old Bailey' (2014) 111(26) *Proceedings of the National Academy of Sciences* 9419
- Desai, Angel, 'Governments confront drunken violence' (2010) 88 (9) *Bulletin of the World Health Organization* 641
- Devereux, John and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworths, 2013)
- Director of Public Prosecutions (Qld), *Guidelines To Replace All Previous Guidelines Annual Report* (2002-03)

- Dressler, Joshua, 'Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Penal Code' (1988) 19(3) *Rutgers Law Journal* (1988) 671
- Dressler, Joshua, *Understanding Criminal Law* (Lexis Nexis, 2012)
- Duff, Antony, 'Choice, Character and Criminal Liability' (1993) 12(4) *Law and Philosophy* 345
- Duff, Antony, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007)
- Eckhardt, Christopher I, Samper, Rita E and Murphy, Christopher M, 'Anger Disturbances Among Perpetrators of Intimate Partner Violence Clinical Characteristics & Outcomes of Court-Mandated Treatment', (2008) 23(11) *Journal of Interpersonal Violence* 1600-1617
- Edelman, James J, 'Preventing Intentional "Accidents": Manslaughter, Criminal Negligence and Section 23 of the Criminal Codes' (1998) 22(2) *Criminal Law Journal* 71
- Elikann, P T, *Tough-On-Crime Myth: Real Solutions To Cut Crime* (Insight Publishing Co., 1996) 239
- Eisikovits, Nir, 'Moral Luck and the Criminal Law' in Joseph Keim Campbell, Michael O'Rourke & David Shier (eds) *Law & Social Justice* (MIT Press, 2005)
- England and Wales Criminal Law Revision Committee, *Offences Against the Person: Homicide* (14<sup>th</sup> Report, 1980) Command paper 7844
- Fairall, Paul A, *Criminal Defences* (LexisNexis Butterworths, 2005)
- Fairall, Paul A, *Homicide: The Laws of Australia* (LexisNexis Butterworths, 2012)
- Finkelstein, Clare, 'Self-Defence as a Rational Excuse' (1996) 57(3) *University of Pittsburgh Law Review* 621

- Finkelstein, Clare, 'Excuses and Dispositions in Criminal Law' (2003) 6(1) *Buffalo Criminal Law Review* 316
- Finkelstein, Clare, 'Is Risk a Harm?' (2003) 151(3) *University of Pennsylvania Law* 963
- Fletcher, George P, 'The Theory of Criminal Negligence: A Comparative Analysis' (1971) 119(3) *University of Pennsylvania Law Review* 401
- Fletcher, George P, 'Fairness and Utility in Tort Theory', (1972) 85 *Harvard Law Review* 537
- Fletcher, George P, 'The Individualization of Excusing Conditions' (1973-74) 47 *Southern California Review* 1269
- Fletcher, George P, 'Rights and Excuses' [1984] *Criminal Justice Ethics Journal* 17
- Fletcher, George P, 'The Right and the Reasonable' [1985] *Harvard Law Review* 949
- Fletcher, George P, 'Why Is Punishment Imposed For?' (1994) 5(1) *Journal of Contemporary Legal Issues* 101
- Fletcher, George P, 'The Place of Victims in the Theory of Retribution' (1999) 3(1) *Buffalo Criminal Law Review* 51
- Fletcher, George P, *Rethinking Criminal Law* (OUP USA, 2000)
- Flynn, Asher & Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide; Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 *Melbourne Law Review* 905
- Flynn, Asher, 'Plea-negotiations prosecutors and discretion: An argument for legal reform' *Australia & New Zealand Journal of Criminology* (2015) 1-19

Flynn, Asher, Halsey, Mark and Lee, Murray, 'Emblematic Violence and Aetiological Cul-De-Sacs: On The Discourse Of 'One-Punch' (Non) Fatalities (2016) 56 *British Journal of Criminology* 179-195.

Fowler H W, & F G Fowler, *The Concise Oxford Dictionary* (Clarendon Press, 1964)

Fox, Richard G, 'The Killings of Bobby Veen: The High Court on Proportion in Sentencing' (1988) 12(6) *Criminal Law Journal* 339

Fox, Richard G, 'The Meaning of Proportionality in Sentencing' (1993-94) 19 *Melbourne University Law Review*

Fox, Robin Lane, *The Classical World* (Penguin Press, 2006) 132, 145

Freiberg, Arie and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008)

Fuller, M D Thomas, *Gnomologia: Adages and Proverbs; Wife Sentences and Witty Sayings, Ancient and Modern, British and Foreign* (Printed for B Barker at the College Arms near Dean's Yard, Westminster; and A Bettesworth & C Hitch, 1732)

Garland, David, *The Culture of Control* (Oxford University Press, 2001)

Galloway, Donald, 'Causation in Criminal Law: Interventions, Thin Skulls and Lost Chances' (1989) 14 *Queen's Law Journal* 71

Gans, Jeremy, *Modern Criminal Law of Australia*, (Cambridge, 2012)

Gardner, John, 'The Gist of Excuses' (1998) 1(2) *Buffalo Criminal Law Review* 575

Gardner, John, 'Justifications and Reasons' in Andrew Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford University Press, 1996)

George, Peter, *Defamation Law in Australia* (LexisNexis Butterworths, 2006)

- Giancola, Peter R and Dominic J Parrott, 'Further Evidence for the Validity of the Taylor Aggressive Paradigm' (2008) 34(2) *Aggressive Behavior* 214
- Gilhooly, Michael, 'Legal Coherence in the High Court: String theory for lawyers' (2013) 87(1) *Australian Law Journal* 33
- Glazebrook, Peter R, 'Constructive Manslaughter and the Threshold Tort' (1970) 28(1) *Cambridge Law Journal* 21
- Gobert, James J, 'The Fortuity of Consequence', (1993) 4(1) *Criminal Law Forum* 1
- Goldflam, Russell, 'Back to the Future' (2012) 53(3) *Balance Column, Journal of the Law Society Northern Territory* 8
- Gordon, G, *The Criminal Law of Scotland* (W. Green & Son Ltd., 1978)
- Goti, Malamud Jaime, 'Rethinking Punishment and Luck' (2004) 39(4) *Tulsa Law Review* 861
- Greco, John, 'A Second Paradox Concerning Responsibility and Luck' (1995) 26(1-2) *Metaphilosophy* 81
- Greenwalt, Kent, 'The Perplexing Borders of Justification and Excuse' (1984) 84(8) *Columbia Law Review* 1897
- Griffith, Sir Samuel, *Explanatory Letter to Draft of a Code of Criminal Law* (Government of Queensland, 1897)
- Gross, Hyman, *A Theory of Criminal Justice* (Oxford University Press, 1979)
- Hall, Jerome, 'Negligent Behavior Should Be Excluded From Penal Liability' [1963] *Columbia Law Review* 632
- Hall, Jerome, *General Principles of Criminal Law* (The Bobbs Merrill Company, 1960)
- Hansard, HL Deb, 18 June 1999, WA 57 quoted in Simester AP & Sullivan GR, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, (2<sup>nd</sup> ed. Hart Publishing, 2003)

- Hart, H LA, *Law, Liberty and Morality* (Oxford University Press, 1963)
- Hart, H LA, 'Intention and Punishment', in J Gardner (ed), *Punishment and Responsibility* (Oxford University Press, 2008)
- Hart, Henry M., 'The Aims of The Criminal Law' (1958) 23(3) *Law and Contemporary Problems* 401
- Heller, Agnes, *General Ethics* (Basil Blackwell Ltd, 1988)
- Henning, Jensen, 'Morality and Luck' (1984) 59(229) *Philosophy* 323
- Heriot, Gail L, 'The Practical Role of Harm in the Criminal Law and the Law of Tort' (1994) 5(1) *Journal of Contemporary Legal Issues* 145
- Herring, Jonathan and Elaine Palser, 'The Duty of Care in Gross Negligence Manslaughter' [2007] *Criminal Law Review* 24
- Heydon, J., 'Aspects of Forensic Rhetoric in the past 50 years' in Justin T. Gleeson and Ruth C.A. Higgins (eds), *Rediscovering Rhetoric* (Federation Press, 2008)
- Herring, J., *Criminal Law: Texts, Cases and Materials* (Oxford University Press, 2006)
- Hirst, Michael, 'Causing death by driving and other offences: a question of balance' (2008) 5(1) *Criminal Law Review* 339
- Hogg, Russell and David Brown, *Rethinking Law and Order* (Pluto Press, 1998)
- Holdsworth, Sir William Searle, *History of English Law* (Sweet and Maxwell, 1938)
- Holmes, Oliver Wendell jnr, *The Common Law*, (Little, Brown and Co, 1881)
- Holmes, Oliver Wendell jnr, 'The Path of the Law' (1896) 10(8) *Harvard Law Review* 457

- Holmes, Oliver Wendell jnr, *The Common Law* (Little Brown, 1963)
- Honore, Tony, 'Responsibility and Luck' (1988) 104(3) *The Law Quarterly Review* 530
- Honore, Tony, *Responsibility and Fault* (Hart, 1999)
- Order, Jeremy, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law and Philosophy* 193
- Order, Jeremy, 'Re-Thinking Non-Fatal Offences Against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 35
- Order, Jeremy, 'A Critique of the Correspondence Principle in Criminal Law' [1995] *Criminal Law Review* 759
- Order, Jeremy, 'Homicide Reform and the Changing Character of Legal Thought' in C. Clarkson, & S. Cunningham, (eds) *Criminal Liability for Non-Aggressive Death*, (Ashgate Publishing Group, 2008)
- Horowitz, Donald L., 'Justification and Excuse in the Program of the Criminal Law' (1986) 49(3) *Law and Contemporary Problems* 109
- Howard, Colin, *Criminal Law* (LBC, 1977)
- Howard. Colin, *Australian Criminal Law* (LBC, 1982)
- Howitt, Dennis, *Crime, The Media and the Law* (Wiley, 1998)
- Hume, David, *Philosophical Essays Concerning Human Understanding* (A. Miller, 1748)
- Hume, David, *An Enquiry Concerning Human Understanding*, (Henry Regnery Co., 1965)

- Indermaur, David and Lynne Roberts, 'Confidence in the criminal justice system' (2009) 387 *Trends and Issues in Criminal Justice* 1
- Jackson, Adam, 'The Meaning of 'Dangerousness' in the Context of Constructive Manslaughter' (2013) 77(1) *The Journal of Criminal Law* 7
- Jerome, Michael and Mortimer J. Adler, *Crime Law and Social Science* (Harcourt, Brace and Co.,1933)
- Kadish, Sanford H, *Blame and Punishment: Essays in the Criminal Law* (Macmillan, 1987)
- Kadish, Sanford H, 'Excusing Crime'(1987) 75(1) *California Law Review* 257
- Kadish, Sanford H, 'The Criminal Law and the Luck of the Draw' (1993-94) 84(4) *Journal Criminal Law & Criminology* 679
- Kant, Immanuel, *Foundations of the Metaphysics of Morals*, (Thomas Kingsmill Abbott trans, ebooks@adelaide, 2014)  
<https://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/index.html>
- Kenny, R G, *An Introduction to Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworths, 2008)
- Kessler, Kimberly D, 'The Role of Luck in the Criminal Law' (1993-94) 142(6) *University of Pennsylvania Law Review* 2183
- Kuhn, Thomas, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962) Lacey, Nicola, 'Legal Constructions of Crime' in Mike Maguire, Rod Morgan & Robert Reiner (eds) *The Oxford Handbook of Criminology* (Oxford University Press, 2007)
- Lam, Helen and Mark Harcourt, 'The Use of Criminal record in Employment Decisions: the Rights of Ex-offenders, Employers and the Public' (2003) 47(3) *Journal of Business Ethics* 237



- Lanham, D et al, *Criminal Laws in Australia* (The Federation Press, 2006)
- Law Commission for England and Wales, *Legislating the Criminal Code: Involuntary Manslaughter* Report No 237 Part III (1996)
- Law Commission for England and Wales, *Murder, Manslaughter and Infanticide*, Report No 304 (2006)
- Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report 87 (2008)
- Lee, Murray, *Fear of Crime; Criminology & The Politics of Anxiety* (Routledge, 2013)
- Levy, Ken M, 'The Solution to The Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It' (2005) 24(6) *Law and Philosophy* 263, LaFave, Wayne R and Austin Wakeman Scott, *Handbook on Criminal Law* 21 (West Publishing Company, 1972)
- Loeber, Rolf and David P Farrington (eds), *Serious & Violent Juvenile Offenders – Risk Factors and Successful Interventions* (Sage Publications, 1998)
- Loh, Wallace D, 'What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling' (1981) 37(4) *Journal of Social Issues* 28
- Lucas. John R., 'The Philosophy of the Reasonable Man' (1963) 13(51) *The Philosophical Quarterly* 97
- Ludwig, Frederick J, 'Foreseeable Death in Felony Murder' (1956-57) 18(1) *University of Pittsburgh Law Review* 51
- Lunetta, Phillippe, Antti Penttila and Seppa Sarna, 'The Role of Alcohol in accident and violent deaths in Finland (2001) 25 *Alcohol Clin. Exp. Res.* 1654
- Luntz, Harold, *Assessment of Damages for Personal Injury and Death*, (LexisNexis Butterworths, 1990)

- Macfie, Alexander L and David D Raphael (eds), *The Theory of Moral Sentiment*, (Clarendon Press, 1976)
- Mackenzie, Geraldine, 'An enduring influence: Sir Samuel Griffith and his contribution to Criminal Justice in Queensland' (2002) 2(1) *Queensland University of Technology Law & Justice Journal* 53
- Mackenzie, Geraldine et al, 'Sentencing and Public Confidence: Results from a National Australia Survey On Public Opinions Towards Sentencing' (2012) 45(1) *Australia New Zealand Journal of Criminology* 1
- Mann, Trischa (ed), *Australian Law Dictionary* (Oxford University Press, 2010) 197
- Marshall, John, 'Punishment for Intentions' (1971) 80(320) *Mind* 597
- Mayo, Moran, *Rethinking the Reasonable Person; An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003)
- Mewett, Alan W., 'The Enigma of Manslaughter' (1992) 34(3) *The Criminal Law Quarterly* 362
- Milhizer, Eugene R., 'Justification and Excuse: What They Were, What They Are, and What They Ought To Be' (2004) 78(3) *St John's Law Review* 725
- Mill, John Stuart, *On Liberty* (Longman, Roberts & Green, 1869)
- Millar, Dale and Neil Vidmar, 'The Social Psychology of Punishment Reactions' [1981] *The Justice Motive in Social Behaviour* 145
- Mitchell, Barry, 'Recklessness Could Still Be A State of Mind' (1988) 52(3) *Journal of Criminal Law* 300
- Mitchell, Barry, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38(3) *British Journal of Criminology* 453

- Mitchell, Barry, 'Further evidence of the relationship between legal and public opinion on the law of homicide' [2000] *Criminal Law Review* 814
- Mitchell, Barry, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64(3) *Modern Law Review* 393
- Mitchell, Barry, 'Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-Punch Killers' (2008) 72 *The Journal of Criminal Law* 537
- Mitchell, Barry and Ron D. Mackay, 'Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases' (2011) 31(1) *Oxford Journal of Legal Studies* 165
- Moore Bruce (ed), *The Australian Oxford Dictionary* (Oxford University Press, 1999)
- Moore, Michael S., 'Causation and the Excuses' (1985) 73(4) *California Law Review* 1091
- Moore, Michael S., 'The Independent Moral Significance of Wrongdoing' (1994) 5(1) *Journal of Contemporary Legal Issues* 1
- Moore, Michael S., *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford University Press, 2010)
- Morse, Stephen J., 'Reasons, Results and Criminal Responsibility' (2004) 2 *University of Illinois Law Review* 363
- Nagel, Thomas, *Mortal Questions* (Cambridge University Press, 1979)
- New South Wales Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics March 2014*, Quarterly Report (2 June, 2014)
- New South Wales Law Reform Commission, 'Partial Defences to Murder: Diminished Responsibility' Report 82 (1997)

New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* Report (1976)

Norrie, Alan, *Crime Reason and History* (2<sup>nd</sup> ed Butterworths, 2001) 24

O'Brien, John & Travers Pauric, *The Irish Emigrant Experience in Australia* (Dufour Ed, 1991)

Oei, Tian P. S. and Alina Morawska, 'A cognitive model of binge drinking: The influence of alcohol expectancies and drinking refusal self-efficacy' (2004) 29(1) *Science Direct* 159

O'Regan, R, 'Sir Samuel Griffiths Code' (1991) 7 *Australian Bar Review* 141

Ormerod, D C, J C Smith & Brian Hogan, *Smith & Hogan's Criminal Law*, (Oxford University Press, 2011)

Oxford University Press, *Oxford English Dictionary* (at 4 September 2009)

Packer, Herbert L, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) 364

Padfield, Nicola, 'Manslaughter: The Dilemma Facing the Law Reformer' [1995] *Journal of Criminal Law* 291

Parker, Richard, 'Blame, Punishment and the Role of Result' (1984) 21(3) *American Philosophy Quarterly* 269

Perkins, Rollin M., *Criminal Law* (Foundation Press, 1969)

Pilgrim, Jennifer Lucinda, Dimitri Gerostamoulos and Olaf Heino Drummer, "'King Hit" Fatalities In Australia, 2000-2012: The Role Of Alcohol And Other Drugs', (2014) 135 *Drug & Alcohol Dependence* 119

- Polk, Kenneth, *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1994)
- Pollock, Frederick and Frederick William Maitland, *History of English Law* (Cambridge University Press, 1923)
- Porter, Jennifer, 'The Implications of Uncertainty in the Law of Criminal Causation for the One-Punch Homicide Offence in Western Australia' (2015) *Bond Law Review* 5-26.
- Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008)
- Queensland Law Reform Commission, *A Review of Jury Directions* Report No 66 (2009)
- Quilter, Dr Julia, 'The Thomas Kelly case: Why a "one punch" law is not the answer' (2014) 38 *Criminal Law Journal* 16
- Quilter, Dr Julia, 'One-punch Laws, Mandatory Minimums and 'Alcohol-Fuelled' as an Aggravating Factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81-106.
- Ranson, David, 'Death from Minor Head Trauma and Alcohol' (2011) 18(3) *Journal of Law and Medicine* 453
- Rawls, John, *A Theory of Justice: Revised Edition* (Harvard University Press, 1999)
- Raz, J., *The Authority of Law: Essays on Law and Morality*, (Oxford University Press, 2009)
- Rescher, Nicholas, 'Luck' (1990) 64(3) *Proceedings and Addresses of the American Philosophical Association* 5
- Richards, Norvin, 'Luck and Desert' (1986) 95(378) *Mind* 198

- Roberts, Julian V and R J Gebotya, 'Reforming Rape Laws: Effects of Legislative Change in Canada' (1992) 16(5) *Law and Human Behavior* 555
- Roberts, Julian V et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003)
- Roberts, Lynne and David Indermaur, *What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes* Australian Institute of Criminology Report (2009)
- Robinson, Paul H, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California Law Review* 266
- Robinson, Paul H, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82(2) *Columbia Law Review* 199
- Robinson, Paul H and John M. Darley, *Justice, Liability and Blame: Community Views and the Criminal Law*, (Westview Press, 1995)
- Robinson, Paul H, 'Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders' (1999) 83(4) *Journal of Criminal Law and Criminology* 693
- Robinson, Paul H and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' [2004] *Oxford Journal Legal Studies* 173
- Room, Robin, Thomas Babor and Jurgen Rehm, 'Alcohol and public health' [2005] *Lancet* 365
- Rosebury, Brian, 'Moral Responsibility and Moral Luck' (1995) 104 (4) *The Philosophical Review* 499
- Rossow, Ingeborg, 'Alcohol and homicide: a cross-cultural comparison of the relationship in 14 European countries', (2001) 96 (Supp.1) *Addiction* 577

Rossow, Ingeborg, Kai Pernanen, and Jurgen Rehm, 'Accidents, Suicide and Violence',  
in Harald Klingemann Gerhard Gmel (eds) *Mapping the Social Consequences of  
Alcohol Consumption* (Springer, 2001)

Ross, David, *Ross on Crime* (LBC, 2011)

Ross, R E, *Russell on Crime*, (Stevens & Sons, 1936)

Ross, W D (ed), *Ars Rhetorica*, (OUP, 1959)

Rutherford, Leslie & Sheila Bone (eds), *Osborn's Concise Law Dictionary* (Sweet &  
Maxwell, 2005)

Sayre, Francis B., 'Criminal Attempts' (1928) 41(6) *Harvard Law Review* 821

Schloenhardt, Andreas, *Queensland Criminal Law*, (Oxford University Press, 2008)

Schloenhardt, Andreas, *Queensland Criminal Law* (Oxford University Press, 2011)

Schulhofer, Steven 'Harm and Punishment: A Critique of Emphasis on the Results of  
Conduct in the Criminal Law' (1974) 12 *University of Pennsylvania Law Review*  
1497

Schwartz, Melanie & Cunneen, Chris, 'Redressing Over-Incarceration, Addressing  
Human Rights; What Can Justice Reinvestment Do in Australia?' (2014) *Right Now*  
16.

Shanahan, M.J, P.E Smith, and S.Ryan, *Carter's Criminal Law of Queensland*,  
(LexisNexis Butterworths, 2011)

Shute, Stephen, 'The Place of Public Opinion in Sentencing Law' [1998] *Criminal Law  
Review* 465

Silvey, James, 'The Criminal Law and Public Opinion' [1961] *Criminal Law Review*  
330

- Simester, Andrew and Bob Sullivan, *Criminal Law Theory and Doctrine* (Hart Publishing, 1978)
- Simester, Andrew and GR Sullivan, *Criminal Law: Theory and Doctrine*, (Hart Publishing, 2007)
- Simester, Andrew P & GR Sullivan, *Simester and Sullivan's Criminal Law* (Hart Publishing, 2010)
- Simester, Andrew and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart, 2011)
- Smith, John C, 'The Element of Chance in Criminal Liability' [1971] *The Criminal Law Review* 63
- Smith, John C. and Brian Hogan, *Criminal Law* (Oxford University Press, 1999)
- Smith, John C and Wayne Hogan *Criminal Law* (Oxford University Press, 2011)
- Spear, Linda Patia, *The Behavioral Neuroscience of Adolescence* (W W Norton, 2010)
- Spencer, John R, "Motor Vehicles as Weapons of Offence" (1985) *Criminal Law Review* 29
- Spencer, John R, 'The Drafting of Criminal Legislation: Need It Be So Impenetrable?' (2008) 67(3) *The Cambridge Law Journal* 585
- Spencer, John R QC and Marie-Aimee Brajeux, 'Criminal Liability For Negligence – A Lesson From Across The Channel' (2010) 59(1) *International and Comparative Law Quarterly* 1
- Spigelman, Jim Chief Justice (NSW), 'Tort Law reform: An overview' (2006) 14 *Tort Law Review* 5



Stanford University, *The Stanford Encyclopaedia of Philosophy* 28 October, 2012

‘Moral Luck’, <http://plato.stanford.edu/entries/moral-luck>

Stephen, James Fitzjames, *History of the Criminal Law of England*, (MacMillan & Co., 1883)

Stephen, James Fitzjames, *A Digest of the Criminal Law: (Crimes and Punishment)* (Sweet and Maxwell, 1926)

The Budget Macquarie Dictionary (The Macquarie Library, 1998)

*The Holy Bible*, Old Testament (The British and Foreign Bible Society, 1611)

Thomas, David, ‘Form and Function in Criminal Law’ in PR Glazebrook (ed), *Reshaping the Criminal Law* (Stevens, 1978)

Thomas, David A., *Principles of Sentencing* (Heinemann, 1979)

Tonry, Michael, ‘Proportionality, Parsimony and Interchangeability of Punishments’, in Antony Duff, Sandra Marshall, Rebecca Emerson and Russell Dobash (eds), *Penal Theory and Practice* (Manchester University Press, 1994)

Tonry, Michael, ‘Learning from the Limitations of Deterrence Research’ in Michael Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2008)

Trimpop, R M, J H Kerr and B D Kirkcaldy, ‘Comparing personality constructs of risk-taking behavior’, [1999] 26 *Personality & Individual Differences* 237

Tröndle, Herbert, *Thomas Fischer: Strafgesetzbuch und Nebengesetze*, (Aufl., München 1999)

Turner, J C W, ‘*Mens Rea* and Motorist’, (1933) 5(1) *Cambridge Law Journal* 61

- Turner, J C W, 'The Mental Element in Crimes at Common Law' (1936-38) 6(1) *Cambridge Law Journal* 31
- Tyler, Tom R, *Why People Obey the Law* (Yale University Press, 1990)
- Van Zyl Smit, Dirk and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67(4) *Modern Law Review* 541
- Victorian Sentencing Advisory Council, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, Report (2006)
- Virgo, Graham, 'Back to Basics-Reconstructing Manslaughter.' (1994) 53(1) *Cambridge Law Journal* 44
- Von Hirsch, Andrew and Andrew Ashworth (eds) *Principled Sentencing: Readings in Theory and Policy* (Hart, 1998)
- Von Hirsch, Andrew et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, (Hart Publishing, 1999)
- Waller, L, and C R Williams, *Criminal Law* (LexisNexis Butterworths, 2001)
- Wasik, Martin, 'Form and function in the law of involuntary manslaughter' [1994] *Criminal Law Review* 883
- Watt, Neil, 'Pleading a Lie', (2009) 29(8) *Proctor* 38
- West, Andrew, 'Accidental grievous bodily harm to a susceptible victim' (2002) 22(4) *The Queensland Lawyer* 109
- Westen, Peter, 'An Attitudinal Theory of Excuse' (2006) 25(3) *Law and Philosophy* 289
- Williams, Glanville, 'Constructive Manslaughter' [1957] *Criminal Law Review* 293
- Williams, Glanville, *Criminal Law – The General Part* (Stevens & Sons, 1961) 136

- Williams, Glanville, 'The Theory of Excuses' [1982] *Criminal Law Review* 732
- Williams, Glanville, *Textbook of Criminal Law* (Stevens, 1983)
- Williams, Glanville, 'Convictions and Fair Labelling' (1983) 42(1) *Cambridge Law Journal* 85
- Williams, John, 'Casualties of Violence in Northern Ireland' (1997) 3 *International Journal of Trauma Nursing* 78
- Willis, John, 'Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed' (1985) 9 *Criminal Law Journal* 109
- Wilner, Ian, 'Unintentional Homicide in the Commission of an Unlawful Act' (1939) 87, 7 *University of Pennsylvania Law Review* 811
- Wilson, William, 'What's wrong with murder?' [2007] 1(2) *Criminal Law and Philosophy* 157
- Wolf, Susan, 'The Moral of Moral Luck' (2001) 31(1) *Philosophic Exchange* 1
- Yeo, Stanley, 'Proportionality in Criminal defences' (1988) 12(4) *Criminal Law Journal* 211
- Yeo, Stanley, 'Blameable Causation' (2000) 24(3) *Criminal Law Journal* 144
- Zimmerman, Michael J., 'Taking Luck seriously' (2002) 99(11) *The Journal of Philosophy* 553
- Zipursky, Benjamin C, 'Two Dimensions of Responsibility in Crime, Tort, and Moral Luck', (2007) 9 (1) *Theoretical Inquiries*

## B. Cases

*Alabaster* [1912] 47 L.J. Newsp.397

*Andrews v DPP* [1937] AC 576

*Arulthilakan v The Queen* [2003] 78 ALJR 257

*Attorney-General for the State of Queensland v Hynds & Anor (No 3)* [2012] QSC 318

*Ball* [1989] Crim LR 730

*Barca v The Queen*

*Barot* [2007] EWCA 1119

*Bedder v DPP* [1954] 1 WLR 1119

*Bibi* [1987] Cr App R 360

*Billam* [1986] Cr App R 347

*Boughey v The Queen* (1986) 161 CLR 10

*Brewster* [1998] 1 Cr App R 220

*Brown v The King* (1913) 17 CLR 570

*Burns v Currell* [1963] 2 QB 433

*Burns v The Queen* (2012) 246 CLR 334

*Callaghan v The Queen* (1952) 87 CLR 115

*Cameron* (1990) 47 A Crim R 397

*Cook v Cook* [1987] 61 ALJR 25

*Coomer* (1989) 40 A Crim R 417

*Coutts* [2006] UKHL 39

*Cranssen v The King* (1936) 55 CLR 509

*Cutter v The Queen* [1997] 71 ALJR 63

*Dabelstein* [1966] Qd R 411

*Darkan v The Queen* (2006) 227 CLR 373

*Dawson* [1985] 81 Cr App R 150

*DPP v Newbury* [1977] AC 500

*DPP v Smith* [1961] AC 290

*Duffy v The Queen* [1981] WAR 72

*Emery* (1978) 18 A Crim R 49

*Evgeniou v The Queen* [1965] ALR 209

*G* (2003) UKHL 50, (2004) 1 AC 1034

*Giorgianni v The Queen* (1985) 156 CLR 47

*Gray v Motor Accident Commission* (1998) 196 CLR 1

*Griffiths v The Queen* [1994] 69 ALJR 77

*He Kaw Teh v The Queen* (1985) 157 CLR 523

*Holmes* [1993] 2 Tas R 232

*Hughes* [1988] 10 Cr App R (S) 169

*Hughes and Lord Advocate* [1963] AC 837

*Hussain* [2004] 2 Cr App R (S) 497

*Hyam* [1975] AC 55

*I v DPP* [2002] 1 AC 285

*Imbree v McNeilly; McNeilly v Imbree* [2008] 82 ALJR 1374

*Inge v The Queen* (1999) 199 CLR 295

*Jackson & Hodgetts* (1989) 44 A Crim R 320

*Kalit* [1971-72] P&NGLR 124

*Kamipeli* [1975] 2 NZLR 610 (CA)

*Kaporonovski v The Queen* (1973) 133 CLR 209

*Kaporonovski v The Queen* (1973) HCA 35

*Kissier* (1982) 7 A Crim R 171

*Kusu* (1980) 4 A Crim R 72

*La Fontaine v The Queen* (1976) 136 CLR 62

*Laws v State* [1988] 26 Texas Crim. 643, 10 SW 220

*Lee* [2012] EWCA Crim 835

*Lewis v Daily Telegraph Ltd* [1964] AC 234

*Lipman* [1969] 3 WLR 819

*MacKenzie* (1996) 190 CLR 348

*Mamote-Kulang of Tamagot v The Queen* (1964) 111 CLR 62

*McAuliffe v The Queen* (1995) 183 CLR 108

*McCallum* [1969] Tas SR 73

*McNamara* [1984] 6 Cr App R (S) 356

*MFA v The Queen* (2002) 213 CLR 606

*Moffa* (1977) 138 CLR 601

*Moloney* [1985] 1 All ER 1025

*Mowatt* [1968] 1 QB 421

*Murray v The Queen* (2002) 211 CLR 193

*Murray v The Queen* (2002) HCA 26

*National & General Insurance Co Ltd v Chick* [1984] 2 NSWLR

*Nettleship v Weston* [1971] 2 QB 691

*O'Brien* [1981] WAR 305

*O'Connor* (1980) 146 CLR 64

*Olsen v Grain Sorghum Marketing Board: Ex parte Olsen* [1962] Qd R 580

*O'Neill* [1967] 51 Crim LR 241

*Osland v The Queen* (1998) 197 CLR 316

*Packett v The King* (1937) HCA 53

*Parker v The Queen* (1963) 111 CLR 610

*Pemble v The Queen* (1971) 124 CLR 107

*People of the State of California v Orenthal James Simpson* [1995] Case No. #BA097211, Los Angeles Superior Court

*People v Causey* [2003] 793 NE 2d 169

*People v Washington* [1965] 62 Cal 2d 777

*Pettipher* [1989] 11 Cr App R (S) 321

*Phillips* [1985] 7 Cr App R (S) 235

*Plomp v The Queen* (1963) 110 CLR 234

*R v Amituanai* (1995) 78 A Crim R 588

*R v Appleby & Ors* [2009] EWCA Crim 2693

*R v Besim* (2004) 148 A Crim R 28

*R v Bibi* [1980] 1 WLR 1193

*R v Blacklidge* (NSWCCA, Unreported, 12 December 1995)

*R v Bruce* CCC [1847] 2 Cox

*R v Callaghan* [1942] St R Qd 40

*R v Camplin* [1978] 2 All ER 168

*R v Carey* [2006] EWCA Crim 17

*R v Cato* [1976] 1 All ER 260

*R v Church* [1966] 1 QB 59

*R v Church* [2010] EWCA Crim 351

*R v Coleman* [1992] Crim LR 315

*R v Condon* [2010] QCA 117

*R v Corbett* [1903] St R Qd 246

*R v Coutts* [2006] 1 WLR 2154

*R v Cowles and Cowles (4)(5)* (2009) EWCA Crim 269

*R v Cowles and Cowles (4)(5)* (2009) EWCA Crim 2693 at para. 20

*R v Crabbe* (1985) 156 CLR 464

*R v Creamer* [1966] 1 QB 72

*R v Creighton* [1993] 3 SCR 3

*R v Darrington and McGauley* [1980] VR 353

*R v Dawson* [1978] VR 536

*R v DeSousa* [1992] 2 SCR 944

*R v Donovan* [1934] 2 KB 498

*R v Dulu Miah* [2005] EWCA Crim 1798

*R v Ellem [No 2]* [1995] 2 Qd R 549

*R v Fairbanks* [1986] 1 WLR 1202

*R v Fernando* [1992] 76 A Crim R 58

*R v Fitzgerald* [1999] QCA 109

*R v Fleeting (No 1)* [1977] NZLR 1

*R v Forbes* (2005) 160 A Crim R 1

*R v Foster & Ors* [2007] EWCA Crim 2869

*R v Frost; Ex-parte A-G* [2004] 149 A Crim R 151

*R v Furby* [2005] EWCA Crim 3147



*R v G & Anor* [2003] UKHL 50

*R v Gallagher* [2007] NSWCCA 296

*R v Goodchild* (unreported, August 12 1991)

*R v Hallett* [1969] SASR 141

*R v Hayward* [1908] 21 Cox 692

*R v Hind* (1995) 80 A Crim R

*R v Hodgetts and Jackson* [1990] 1 Qd R 456

*R v Holzer* [1968] VR 481

*R v Hung* [2012] QCA 341

*R v Hung* [2012] QSC 158

*R v Hurley* [1967] VR 526

*R v Hyam* [1975] AC 55

*R v JM and SM* [2012] EWCA Crim 2293

*R v Jobidon* [1988] 45 CCC (3<sup>rd</sup>) 176

*R v Joinbee* [2013] QCA 246

*R v Keenan* (2009) 236 CLR 397

*R v Kirkman* [1987] 44 SASR 591

*R v Knutsen* [1963] Qd R 157

*R v Kusu* [1981] Qd R 136

*R v Lamb* [1967] 2 QB 981

*R v Lavender* (2005) 222 CLR 67

*R v Lawrence* [1980] 1 NSWLR 122

*R v Little* [2006] QSC (unreported)

*R v Little* [2006] QSC (unreported)

*R v Loveridge* [2013] NSWSC 1638

*R v Loveridge* [2014] NSWCCA 120

*R v Major* [2013] QCA 114

*R v Mallet* [1972] Crim LR 260

*R v Mallet* [1972] Crim LR 260

*R v Martyr* [1962] Qd R 398

*R v Martyn* [2011] NTSC

*R v McCallum* [1969] TAS SR 73

*R v Mead* [2010] QCA 370

*R v Mills* [1998] 4 VR 235

*R v Minor* [1992] 2 NTLR

*R v Mitchell* [1983] QB 741

*R v Morgan* [1975] UKHL 3; (1976) AC 182

*R v Mullen* [1938] St R Qd 97

*R v Newbury* [1977] AC 500

*R v Nydam* [1977] VR 430

*R v Offen (No 2)* [2001] 1 Cr App R 372

*R v Pagett* [1983] 76 Cr App R 279

*R v Pakazoff* [1986] 43 SASR 99

*R v Paul Anthony Van Den Bemd* [1992] QCA 236

*R v Puckeridge* [1999] 74 ALJR 373

*R v Rau* [1972] Tas SR 59

*R v Sandby* [1993] 117 FLR 218

*R v Scarth* [1945] St R Qd 38

*R v Seminara* [2002] QCA 131

*R v Sharp* [1987] QB 853

*R v Smith* [1959] 2 QB 35

*R v Smithers* [1978] 1 SCR 506

*R v Steindl* [2002] 2 Qd R 542

*R v Stuart* (1974) 134 CLR 426

*R v Taiters* [1997] 1 Qd R 333

*R v Tupou; ex parte A-G (Qld)* [2005] QCA 179

*R v Van Den Bemd* (1994) 179 CLR 137

*R v Van Den Bemd* [1995] 1 Qd R 401

*R v Wardle* [2011] QCA 339

*R v Watson* [1989] EWCA Court of Appeal (Criminal Division)

*R v Willersdorf* [2001] QCA 183

*R v Wills* [1983] VR 201

*R v Wooler* [1971] QWN 10

*R v Young* [1969] Qd R 417

*Re Attorney-General's Reference (No 6 of 1980)* [1981] 1 QB 715

*Royall v The Queen* (1991) 172 CLR 378

*Royall v The Queen* [1991] 65 ALJR 451

*Ryan v The Queen* (1967) 121 CLR 205

*Saviane v Stauffer Chemical Co (Australia) Pty Ltd* [1974] 1 NSWLR

*Snow* [1962] Tas SR 271

*Southern Portland Cement Ltd v Cooper* [1974] AC 623

*Stapleton v The Queen* (1952) 86 CLR 358

*State of Maine v Robert Pray* [1977] 378 A 2d 1322

*State v Budge* [1927] 126 Me 223, 137 A 244

*State v Frazier* [1936] 98 SW 2d 707 Mo

*Stevens v The Queen* (2005) HCA 65

*Stevens v The Queen* [2005] 80 ALJR 91

*Taiters* [1997] 1 Qd R 333

*Timbu-Kolian v The Queen* (1968) 119 CLR 47

*Tominey* [1986] 8 Cr App R (S) 161

*Upton* [1980] 71 Cr App R 102

*Vallance v The Queen* (1961) 108 CLR 56

*Vallance v The Queen* (1961) HCA 42

*Van Den Bemd* [1995] 1 Qd R 401

*Vaughan v Menlove* [1837] 3 Bing NC 468; 132 ER 490

*Veen v The Queen* (1979) 143 CLR 458

*Veen v The Queen [No 1]* (1979) 143 CLR 458

*Veen v The Queen [No 2]* (1988) 164 CLR 465

*Viro* (1978) 141 CLR 88

*Walker* [1992] 13 Cr App R (S) 474

*Watmore v Jenkins* [1962] 3 WLR 463

*Watson* [1989] 1 WLR 684

*Western Australia v Jones* [2011] WASC 136

*Western Australia v JWRL (No 4)* [2009] WASC 392

*Western Australia v JWRL* [2010] WASC 179

*Western Australia v JWRL* [2010] WASC 392

*Western Australia v Lillias* [2012] WASCR 100

*Wicks* [1989] 3 WAR 372

*Wilson v The Queen* (1992) 174 CLR 313

*Woolmington v DPP* [1935] AC 462

*Zikovic* (1985) 17 A Crim R 396

## **C. Legislation**

*Amendment of Crimes Act (No 40) 1900 (NSW)*

*American Model Penal Code 1962*

*Californian Penal Code 1872*

*Civil Liability Act 1936 (SA)*

*Civil Liability Act 2002 (NSW)*

*Civil Liability Act 2003 (Qld)*

*Code Civil [Civil Code] (France)*

*Crimes (Sentencing Procedure) Act 1999 (NSW)*

*Crimes Act 1900 (NSW)*

*Crimes Act 1914 (Cth)*

*Crimes Act 1958 (Vic)*

*Crimes Amendment (Gross Violence Offences) Bill 2012 (Vic)*

*Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 (NSW)*

*Crimes Sentencing Act 2005 (ACT)*

*Criminal Code 2002 (ACT)*

*Criminal Code (Assault Causing Death) Amendment Bill 2007(Qld)*

*Criminal Code (Violent Act Causing Death) Amendment 2012 (NT)*

*Criminal Code 1899 (Qld)*

*Criminal Code 1913 (WA)*

*Criminal Code 1924 (Tas)*

*Criminal Code 1983 (NT)*

*Criminal Code 1985 (Can)*

*Criminal Code 1995 (Cth)*

Criminal Code and Other Legislation Amendment Bill 2010 (Qld)

*Criminal Law (Sentencing) Act 1988 (SA)*

Criminal Law Amendment (Homicide) Bill 2008 (WA)

*Criminal Law Amendment Act 1997 (Qld)*

Criminal Procedure Regulation 2010 (NSW)

*Dangerous Prisoner (Sexual Offenders) Act 2003 (Qld)*

Explanatory Memorandum, Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014 (Vic), 19 August 2014.

Explanatory Notes, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) 3.

*German Criminal Code (1998)*

*Jury Act 1995 (Qld)*

*Liquor Amendment Bill 2014 (NSW)*

*Penalties and Sentences Act 1992 (Qld)*

*Road Traffic Act 1930 (UK)*

*Road Traffic Act 1978 (UK)*

Safe Night Out Legislation Amendment Bill 2014 (Qld)

*Sentencing Act 1991* (Vic)

*Sentencing Act 1995* (WA)

*Sentencing Act 1999* (NT)

*Sentencing Act 2002* (NZ)

*Stratfgesetzbuch* [Criminal Code] (Germany) [*StGB*]

*Summary Offences Act 1979* (NT)

*Victims Compensation Act 1996* (NSW)

*Victims of Crime Assistance Act 1996* (Vic)

*Victims of Crime Assistance Act 2009* (Qld)

*Wrongs Act 1958* (Vic)

Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012 (Qld)

## **D. Treaties**

*International Covenant on Civil and Political Rights* opened for signature 16 December 1966 (entered into force 23 March 1976) Art. 6 (1)

*Universal Declaration on Human Rights*, GA Res 217 A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948)



## E. Other Sources

AAP, 'New laws target 'coward punch' killers', *The Age*, (Melbourne) 17 August 2014, <http://www.theage.com.au/victoria/new-laws-target-coward-punch-killers-20140817-10525m.html>

AAP, 'King Hit a 'coward's punch' says family of Daniel Christie and minister agrees', AAP (online) 3 January 2014, <http://www.theguardian.com/world/2014/jan/03/king-hit-a-cowards-punch-says-family-of-daniel-christie-and-minister-agrees>

ABC TV, *Australian Story*, 13 August 2007 (Deborah Fleming)

ABC TV, 'Man cleared of one punch manslaughter charge' *ABC News* , 27 March 2008 <http://www.abc.net.au/news/2008-03-27/man-cleared-of-one-punch-manslaughter-charge/2385088>

ABC TV, 'A Mother gets suspended sentence for four-year-old's manslaughter', *ABC News*, December 18, 2008

ABC TV, 'A Matter of Life and Death' *Four Corners*, 30 July 2012 (Quentin McDermott), <http://www.abc.net.au/4corners/stories/2012/07/30/3554420.htm>

ABC TV, 'Punch Drunk', *Four Corners*, 25 February 2013 (Janine Cohen), <http://www.abc.net.au/4corners/stories/2013/02/25/3695353.htm>

ABC TV, 'Punch Drunk' *Four Corners*, 25 February 2013, (Graeme Henson) <http://www.abc.net.au/4corners/stories/2013/02/25/3695353.htm>

'Aberrant Behavior', (18 United States Sentencing Commission Guidelines Manual, Appendix 5K2.20, 2004)

Aboriginal & Torres Strait Islanders Legal Services, 'Submission 025 to the Queensland Parliament Legal Affairs and Community Safety Committee *Safe Night Out Legislation Amendment Bill* 2014', (Submission, 04 July 2014)

Ackland, Richard, 'Prongs of Premier Barry O'Farrell's alcohol plan aren't very sharp', *Sydney Morning Herald* (Sydney), 24 January 2014, <http://www.smh.com.au/comment/prongs-of-premier-barry-ofarrells-alcohol-plan-arent-very-sharp-20140123-31bk8.html>

Ardern Lucy, 'Longer sentences 'not the answer'', Gold Coast Publications Pty Ltd. (online), <http://www.goldcoast.com.au/article/2011/02/19/292931>

Attorney-General(WA) Jim McGinty, 'New Law to deal with 'one punch' deaths' (Ministerial Media Statement 14 March 2008), <https://www.mediastatements.wa.gov.au/Pages/Carpenter/2008/03/New-laws-to-deal-with-'one-punch'-deaths.aspx>

Australian Bar Association President, Mark Livesey QC, 'ABA opposes Victoria's proposed "one punch" laws with mandatory sentences', (Media Release, 20 August 2014)

Australian Bureau of Statistics (Cth), 'Prison population increased by 40% over past 10 years' (Media release No. 178 23 December, 2004)

Australian Bureau of Statistics, 'Causes of Death' (Australia 200 ABS Cat No 3303.0, 2009)

Australian Bureau of Statistics (Cth), 'Prisoners in Australia' (Media release, 2 April 2013)

Australian Medical Association, 'Youth Binge Drinking Culture Must End' (Media Release, 25 February 2008)

Ball, Rachel, 'Human rights implications of 'unlawful assault causing death' laws', Briefing Paper, *Human Rights Law Centre*, Melbourne, 14 March 2012

Bathurst Tom Chief Justice (NSW), 'Community Participation in Criminal Justice' (Speech delivered at the opening of Law Term Dinner, Sydney, 30 January 2012)

Benny-Morrison, Ava, 'Manslaughter Verdict for Fatal Punch', *The Queensland Times* (Brisbane), 12 September 2012

Bibby Paul, 'Kieran Loveridge jailed for four years for killing Thomas Kelly', *Sydney Morning Herald* (online), 8 November 2013, <http://www.smh.com.au/nsw/kieran-loveridge-jailed-for-four-years-for-killing-thomas-kelly-20131108-2x5j5.html>

Blakeslee, Sandra, 'Computing Crime and Punishment', *The New York Times*, (online), 16 June 2014 [http://www.nytimes.com/2014/06/17/science/computing-crime-and-punishment.html?\\_r=1](http://www.nytimes.com/2014/06/17/science/computing-crime-and-punishment.html?_r=1)

'Bolton teenager Eden Lomax sentenced for Bolton murder', *BBC News* (Manchester), 9 December 2013

Brown, Anne-Louise, 'Tribal payback' resulted in stab death', *The Sydney Morning Herald* (Sydney), 27 June 2012

'Call to extend pub curfew after Newcastle success', *Newcastle Herald* (online), 16 July 2010 <http://www.theherald.com.au/story/455484/call-to-extend-pub-curfew-after-newcastle>

Cardy, Todd, 'Teen first guilty verdict under new 'One Punch' law', *Perth Now* (online), 30 October 2009 <http://www.perthnow.com.au/search-results?q=teen%20first%20guilty%20verdict%20under%20new%20one%20punch%20law>

Cardy, Todd, 'Killer of Woodvale Teenager Steven Rowe avoids jail after self-defence plea accepted', *Perth Now* (online), 11 December 2009, <http://www.perthnow.com.au/news/western-australia/killer-of-woodvale-teenager-steven-rowe-avoids-jail-after-self-defence-plea-accepted/story-e6frg13u-1225809535497>

*Canadian Charter of Rights & Freedoms*

*Charter of Fundamental Rights of the European Union*

Clennell, Andrew, 'Mandatory eight-year minimum for drunk punchers', *The Daily Telegraph* (online), 20 January 2014, <http://www.dailytelegraph.com.au/news/nsw/mandatory-eightyear-minimum-for-drunk-punchers/story-fni0cx12-1226806255812>

Coutts, Sharona, 'One Punch Can Change Your Life – And Hundreds of Others', *The Global Mail*, (London) 19 July 2012

Cowdery, Nicholas, 'Caution urged in alcohol-violence counter measures', *Sydney Morning Herald*, (Sydney) 22 January 2014,

<http://www.smh.com.au/comment/caution-urged-in-alcoholviolence-counter-measures-20140121-316tp.html>

Davies, Lisa, 'Thomas Kelly's parents petition Premier Barry O'Farrell for law review', *Sydney Morning Herald* (online), 11 November 2013

<http://www.smh.com.au/nsw/thomas-kellys-parents-petition-premier-barry-ofarrell-for-law-review-20131110-2xa2y.html>

Department of Justice and Attorney-General (Qld), 'Audit on Defences to Homicide: Accident and Provocation', (Discussion Paper, October 2007)

Department of Justice (Vic) 'New juries direction bill introduced into Parliament' (Media release issued 13 December 2012)

De Jersey, Paul Chief Justice (Qld), 'A Fair Balance of Law', *The Courier Mail* (Brisbane), 5 May 2007

Dillon, Meagan, 'Family 'shattered' by cop killer sentence', *Northern Territory News* (online), 20 July 2011 <http://www.ntnews.com.au>

Editorial, 'Tardy Premier takes back control of alcohol scourge', *Sydney Morning Herald*, (Sydney) 21 January 2014,  
<http://www.smh.com.au/action/printArticle?id=5093939>

Edminstone, Leanne and Jodie Munro O'Brien, 'Families Robbed – Voice of the Victim 'Lost in Legal System'', *The Courier Mail* (Brisbane), 2 May 2007

England & Wales Sentencing Guidelines Council, 'Overarching Principles: Seriousness', (Guideline 5, December, 2004)  
<http://www.sentencingcouncil.org.uk/publications/item/overarching-principles-seriousness-definitive-guideline/>

Gibb, Frances, 'One-punch' killers to get longer jail sentences', *The Times*, (online) 19 December 2009, <http://www.thetimes.co.uk/tto/law/article2215352.ece>

Gibbs, Sir Harry, 'The Queensland Criminal Code: From Italy to Zanzibar' (Address at Opening of Exhibition Queensland Supreme Court Library, Brisbane, 19 July 2002)

Gleeson, Murray Chief Justice High Court of Australia, *Out of Touch or Out of Reach?* (Speech to Judicial Conference of Australia Colloquium, Adelaide 2 October 2004)

Goldflam, Russell, President, Criminal Lawyers Association (NT), *One punch homicide law equals one punch policy*, (Media release, August 20, 2012)

Griffiths, Samuel, *Criminal Responsibility: A Chapter from a Criminal Code* (Address to a meeting of the Australasian Association for the Advancement of Science, Sydney, 12 January 1898)

Griffiths, Emma and Simon Cullen, 'Smokers slugged in Government's plan to raise \$5.3 billion', *ABC News* (Australia), 1 August 2013, <http://www.abc.net.au/news/2013-08-01/government-to-raise-5-billion-from-cigarette-tax-increase/4857244>

Haesler, Andrew SC, 'Police Powers 2006: The Law Enforcement (Powers and Responsibilities) Act (2002)', (Paper presented at NSW Public Defenders Professional development course, Sydney, 17 March 2007)

Hall, Roger, 'Tax best weapon in booze fight', *The New Zealand Herald* (New Zealand), 27 March, 2013

Harrison, Justice Ian G, Sentencing Conference Speech (Speech delivered at The Great Hall, University House, Australian National University, Canberra, Friday 8 February 2008), <http://www.supremecourt.justice.nsw.gov.au/Documents/harrison080208.pdf>

Hill, Michael QC & David Winkler QC, 'Juries: How Do They Work? Do We Want Them' (Jury Project Discussion Paper, The International Society for the Reform of Criminal Law, December 2000)

Hunter, Neil, 'Widow of one punch victim Spencer Freeman backs Echo campaign for tougher sentencing', *The Northern Echo* (online), 10 November 2011, <http://www.thenorthernecho.co.uk/news/9354143.print/>

Ireland Law Reform Commission, *Involuntary Manslaughter*, (Consultation Paper No. 44-2007, 2007)

Jenkins, Melissa, 'Gross violence laws 'won't cut crime'', *The Sydney Morning Herald*, (Sydney) Nov. 10, 2011, <http://www.smh.com.au/breaking-news-national/gross-violence-laws-wont-cut-crime-20111110-1n7rh.html>

- ‘Join our Real Heroes Walk Away campaign to stop the violence’, news.com.au, 14 September 2012 <http://www.news.com.au/national/join-our-real-heroes-walk-away-campaign-to-stop-the-violence/story-fndo4eg9-1226473655351>
- Johnston, Philip, ‘The price of just one punch: Lewis Gill is jailed for four years for hitting Andrew Young, but would tougher sentencing remind violent men that a single blow can be fatal?’, *Telegraph* (online), 26 February 2014, <http://www.telegraph.co.uk/news/unews/law-and-order/10662826>
- Jones, Craig et al, *Impact of Restricted Alcohol Availability on Alcohol-related violence in Newcastle* (New South Wales Bureau of Crime Statistics and Research, 2009)
- Justice for Women, *Partial Defences to Murder: Response from Justice for Women* (Consultation Paper 173 United Kingdom Law Commission, 2004)
- Kidd, Rob, ‘Schoolboy Death: Family’s frustration boils over’, *New Zealand Herald*, (online), 7 August 2014 [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11305332](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11305332)
- Krug, Etienne G. et al, *World report on violence and health*, World Health Organisation, 2002, 1-21 [http://whqlibdoc.who.int/publications/2002/9241545615\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf)
- Law Reform Commission, *Seminar Paper on Homicide: The Mental Element in Murder*, (Seminar paper LRC SP1-2001 21 March, 2001)
- Law Reform Commission of Canada, *Sexual Offences* (Working paper No 22, 1978)
- Law Institute of Victoria, Submission No. 11 to Sentencing Advisory Council (Vic), *Statutory Minimum Sentences for Gross Violence*, 01 July 2011
- Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects* (Discussion Paper No 2, 1986) 51.
- Lewis, Gill, ‘Bournemouth death punch sentence reviewed’, *BBC News* (Dorset), 26 February 2014
- Lloyd, David C, Gareth Mair and Mike Hough, *Explaining Reconviction Rates: A critical analysis*, (Home Office Research Study No 135, 1994)

- Loring, Kerry, 'Sentencing in Club Ice Punching Death' KRCR-TV, News Channel 7, December 22, 2011 <http://www.krctv.com>
- Marsh, Vanessa, 'Manslaughter accused not guilty', *Bundaberg News Mail* (online), 23 August 2012. <http://www.news-mail.com.au/story/2012/08/23/manslaughter-accused-not-guilty>
- McKean, Bruce, 'Mark's Parents Vow to Spread Word that One Punch Can Kill', *The Daily Mercury* (Hobart), 21 February 2009
- Mears, Bill, 'Supreme Court won't delay release of California inmates', *CNN* (online), 4 August 2013, <http://edition.cnn.com/2013/08/02/justice/california-inmates-release/index.html>
- Meredith, Amee, 'All of this because of one punch – one senseless punch', (online), 21 August 2012, <http://www.heraldsun.com.au/news/national/it-just-took-one-senseless-punch-to-kill-brett/story-fndo48ca-1226455133989>
- Mitchell, Barry, *The Barrister Magazine* (online), 30 July, 2010 (Trinity Term issue) <http://www.barristermagazine.com/barrister/index.php?id=30>
- Model Criminal Code Officers Committee (Cth), *Fatal Offences Against the Person* (Discussion Paper, 1998)
- Moore, Tony, 'Paroled inmates unable to find accommodation returning to prison at \$70,000 per year', *Brisbane Times* (online), 8 April 2014 <http://www.brisbanetimes.com.au/queensland/paroled-inmates-unable-to-find-accommodation-returning-to-prison-at-70000-a-year-20140407-369q6.html>
- Morrison, S.A., and I. O'Donnell, *Armed Robbery: A Study in London* (Occasional Paper 15, University of Oxford: Centre for Criminological Research, 9 November 1994)
- Needham Kirsty, 'Mandatory sentencing for alcohol violence could overcrowd prisons' *Sydney Morning Herald* (online), 2 February 2014 <http://www.smh.com.au/nsw/mandatory-sentencing-for-alcohol-violence-could-overcrowd-prisons-20140201-31tx6.html>

- Northern Territory Attorney-General and Minister for Justice, John Elferink MLA, 'Gap in Legislation Closed by One Punch Law', (Media Release, 28 November 2012)
- Oakes, Dan, 'One Punch Can Kill', *Sydney Morning Herald*, (Sydney) January 2, 2013
- Office of the Director of Prosecutions (WA), 'Summary of convictions under s 281 of the *Criminal Code 1913*(WA)' (Western Australia, 28 August 2012)  
[http://www.dpp.wa.gov.au/files/assault\\_occasioning\\_death.pdf](http://www.dpp.wa.gov.au/files/assault_occasioning_death.pdf)
- Ogloff, James RP, *Judicial Instructions and Jury: a comparison of Alternative Strategies*, (Final Paper, British Columbia Law Foundation, 1998)
- Olding, Rachel and Nicole Hasham, 'Demand For Tougher Laws On Drunken violence', *Sydney Morning Herald* (online), 3 January 2014,  
<http://www.smh.com.au/nsw/demand-for-tougher-laws-on-drunken-violence-20140102-3080t.html>
- One News, 'Bouncer in tears after guilty death-fall verdict' 21 June 2012 (online)  
<http://tvnz.co.nz/national-news/bouncer-in-tears-after-guilty-death-fall-verdict-4939784>
- One Punch Assault Laws Pass Parliament*, (Media release, 30 January 2014),  
<https://www.nsw.gov.au/news/one-punch-assault-laws-pass-parliament>
- 'One-Punch killers face new sentences', *BBC News* (online) 19 December 2009  
[http://news.bbc.co.uk/2/hi/uk\\_news/wales/8421526.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/8421526.stm)
- Palk, Gavan, Jeremy Davy, and James Freeman, *Perspectives on the effectiveness of the late night liquor trading lockout legislation provision*, (Paper presented in proceedings of Stockholm Criminology Symposium, 2008)
- Partridge, Emma, 'Hugh Garth to face new one-punch law over Raynor Manalad's death', *Sydney Morning Herald* (Sydney), 7 May 2014,  
<http://www.smh.com.au/nsw/hugh-garth-to-face-new-onepunch-law-over-raynor-manalads-death-20140507-zr67b.html>
- Patty, Anna 'Proposed laws will give 20 years for 'one-punch' killings', *Sydney Morning Herald* (online), 13 November 2013,



<http://www.smh.com.au/nsw/proposed-laws-will-give-20-years-for-onepunch-killings-20131112-2xenc.html>

Patty, Anna and Nicole Hasham, 'Bill to combat brawl deaths sets blood-alcohol level at .15 for 'intoxication'', *Sydney Morning Herald*, (Sydney) 30 January 2014, <http://www.smh.com.au/nsw/bill-to-combat-brawl-deaths-sets-bloodalcohol-level-at-15-for-intoxication-20140130-31oh9.html>

Pierce, Jeremy, 'Gold Coast busker who punched a heckler has been counselled by Surfers Paradise Officials', *Courier-Mail* (online), 18 March 2013, <http://www.couriermail.com.au/news/queensland/gold-coast-busker-who-punched-a-heckler-has-been-counselled-by-surfers-paradise-officials/story-e6freoof-1226599989455>

Piotrowski, Daniel, 'Doctor says violence dropped after Heroes campaign', *www.news.com.au* (Australia) October 11, 2012, <http://www.news.com.au>

Poll, 'Are the new alcohol-fuelled violence laws working' Yes: 7,392. No: 24,291, *Ninemsn* (online) (4 July 2014), [www.ninemsn.com.au](http://www.ninemsn.com.au)

Queensland Department of Justice and Attorney-General, 'Audit on Defences to Homicide: Accident and Provocation', (Discussion Paper, October 2007)

Queensland Government, *One Punch Can Kill* (Media Release, December 2007), <http://www.onepunchcankill.qld.gov.au>

Queensland Law Society, 'Submission to Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014 (Qld)', 2014, Explanatory Notes 4

Queensland Homicide Victims Support Group, 'Submission to Department of Justice & Attorney-General's *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*', (Submission, October 2007)

Queensland Legal Aid, 'Submission to Legal Affairs and Community Safety Committee, Safe Night Out Legislation Amendment Bill 2014 (Qld)', 4 July 2014, Explanatory Notes 2

Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007', 9 August 2007', (Mark McArdle)

Queensland, *Parliamentary Debates*, Legislative Assembly, 'Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007', 14 November 2007', (Kerry Shine)

Queensland Premier Campbell Newman, 'Safe Night Out Strategy', (Media release, 23 March, 2014)

*Queensland Supreme and District Courts Benchbook*, 'Accident s23 (10 (b) No. 75 available at Queensland Courts, [http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/86084/sd-bb-75-accident.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/86084/sd-bb-75-accident.pdf)

Ralston, Nick, 'Assault rate rises in NSW homes', *Sydney Morning Herald*, (Sydney) 3 June 2014, <http://www.smh.com.au/national/assault-rate-rises-in-nsw-homes-20140602-39et5.html>

Rawlinson, Clare, 'Alcohol policies stir concern over domestic violence spike', *Australian Broadcasting Commission* (online), August 2012, <http://www.abc.net.au/local/stories/2012/08/02/3558982.htm>

Record Searchlight, 'Schauman gets three-year prison sentence for fatal punch' *www.redding.com* (online), December 22, 2011

Ryan, John MLC, *Inquiry on the Increase in Prisoner Population*, (NCOSS Scales of Justice Conference, Sydney, 25 July 2002)

'Saori's Law defeated' *In My Community* (online), 30 October 2012, <http://comment.inmycommunity.com.au/news-and-views/local-news/Saoris-Law-defeated>

Sheehan, Paul *Sydney Morning Herald* (online), 11 November 2013 'Judge with no sense of the real world' <http://www.smh.com.au/comment/judge-with-no-sense-of-the-real-world-20131110-2x9zp.html>

Spigelman, Jim Chief Justice (NSW), *Sentencing Guideline Judgments*, (Address to the National Conference of District and County Court Judges, Sydney, 24 June 1999)

Stigwood, Emmaline, 'No Jail Time Over Senseless Death', *Gold Coast Bulletin*, 22 June, 2011

The England and Wales Law Commission, *Murder, Manslaughter and Infanticide*: *Project 6 of the Ninth Programme of Law Reform: Homicide*, (Consultation Paper No 304, 28 November 2006)

The Women's Council for Domestic and Family Violence Services (WA), *Petition in Relation to the Laying of Charges in Case of Deaths Resulting From Domestic Violence*, (Petition 161, 12 September 2012)

Turner, Ellie, 'One Punch' crowd rallies', *ntnews.com.au*, (online) 21 August 2012, [http://www.ntnews.com.au/article/2012/08/21/313027\\_ntnews\\_pf.html](http://www.ntnews.com.au/article/2012/08/21/313027_ntnews_pf.html)

United Kingdom, *Parliamentary Debates*, House of Commons, 22 February 2010, vol 506, col 27 (Jack Straw)  
<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100222/debtext/100222-0004.htm#1002228000191>

Victorian Government, *Health Information & News* (20 May 2014),  
[www.betterhealthchannel.vic.gov.au](http://www.betterhealthchannel.vic.gov.au)

Vogler, Sarah, 'Fatal coward punches to attract longer prison sentences under harsh new laws', (online), 23 March 2014,  
<http://www.couriermail.com.au/news/queensland/fatal-coward-punches-to-attract-longer-prison-sentences-under-harsh-new-laws/story-fnihsrf2-1226862195878>

Watt, Amanda, 'Acquittal 'Says Killing OK' – Family Devastated as Man Admits Unprovoked Bashing Death but Walks Free', *The Courier Mail* (Brisbane), 2 April 2007

Weatherburn, Dr Don, 'Lockouts and Last Drinks: The Impact of the January 2014 Liquor Licence Reforms On Assaults in NSW, Australia' (Media Release, 16 April 2015)

Western Australian Law Reform Commission, *Review of the Law of Homicide*, (Project No. 97, 2007)

Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210, (James McGinty)

Whitbourn, Michaela, 'Legal eagles punch holes in mandatory sentence plan', *Sydney Morning Herald*, (Sydney) 23 January 2014, <http://www.smh.com.au/nsw/legal-eagles-punch-holes-in-mandatory-sentence-plan-20140122-31965.htm>[www.ninemsn.com.au](http://www.ninemsn.com.au)

'Wicklow man acquitted of manslaughter of his sister's boyfriend', *The Irish Times* (Dublin), 6 July 2004.

Willingham, Richard, 'Lawyers condemn coward punch laws', *The Age*, (Melbourne) 18 August 2014, <http://www.theage.com.au/victoria/lawyers-condemn-coward-punch-laws-20140817-10527m.html>

Women's Council for Domestic and Family Violence Services (WA), *Unlawful Assault Causing Death'; Justice System fails victims of domestic and family violence* (Media Release, 3 May 2012).